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Nos. 156 and 163

In the Supreme Court of the United States

OCTOBER TERM, 1949

THE UNITED STATES, PETITIONER

v.

COMMODITIES TRADING CORPORATION, ET AL.

COMMODITIES TRADING CORPORATION, ET AL., PETITIONERS

v.

THE UNITED STATES

ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 156

THE UNITED STATES, PETITIONER

v.

COMMODITIES TRADING CORPORATION, ET AL.

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ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims is reported at 113 C. Cls. 244.

JURISDICTION

The judgment of the Court of Claims was entered on April 4, 1949. The petition for a writ of certiorari in No. 156 was filed on July 1, 1949,

and the cross-petition for writ of certiorari in No. 163 was filed on July 5, 1949. Certiorari was granted in both cases on October 24, 1949 (R. 138–139). The jurisdiction of this Court rests upon 28 U. S. C. 1255.

QUESTIONS PRESENTED

1. Whether in a suit for just compensation by the owner of whole black pepper, requisitioned by the United States for war uses, the proper measure of just compensation was the lawful O. P. A. ceiling price which, at the time it was established, approximated free market value and thereafter formed the basis for substantial trading—or a so-called "retention value" which took into account, among other items, scarcity "value" caused by wartime shortages and a speculative "value" based upon the expectation of ultimate removal of wartime price restrictions.

2. Whether the Court of Claims erred in failing to award petitioners 22 cents per pound for the whole black pepper requisitioned from them.

STATUTES INVOLVED

The pertinent portions of the Requisitioning Act as it read at the time of the requisition in question (Act of October 16, 1941, c. 445, 55 Stat. 742, as amended by the Act of March 27, 1942, c. 199, 56 Stat. 181, and the Act of June 30, 1943, c. 181, 57 Stat. 271) are set forth in Appendix A, *infra*, pp. 117–118. Appendix B contains relevant

excerpts from the Emergency Price Control Act of 1942 (Act of January 30, 1942, c. 26, 56 Stat. 23, 50 U. S. C. App. 901). *Infra*, pp. 119–124.

The Office of Price Administration's Revised Price Schedule No. 52—Pepper, as it provided at the time of the requisition involved here (May 26, 1944) is set forth in Appendix C, *infra*, pp. 125–131.

STATEMENT

Commodities Trading Corporation (Commodities), has brought this suit to recover just compensation for the requisition by the War Department, in May 1944, of some 760,000 pounds of whole black pepper. The pertinent facts are these:

1. Whole black pepper is grown in Sumatra, French Indo-China and India, the Lampong type here involved being grown only in Sumatra (R. 15). It is not perishable and will last unimpaired in quality for several decades (R. 22). In March 1942, when this country was cut off from these producing areas (except India) by Japanese military successes in the Pacific, there were about 78,000,000 to 100,000,000 pounds (about three years' supply) of whole black pepper in the hands of importers in the United States (R. 15). Of this stockpile, approximately 17,000,000 was owned by Commodities and had been accumulated by it since its incorporation in 1933 (R. 14, 15). On December 7, 1941, Commodities had had ap-

proximately 21,000,000 pounds, but 4,000,000 pounds had been sold for future delivery and was delivered in the early months of 1942 (R. 14).

During the years 1936 to 1940, both inclusive, the average annual price of whole black pepper, computed from daily spot prices, had been: 1936, 5.5 cents per pound; 1937, 6.1 cents; 1938, 5.4 cents; 1939, 4.0 cents; 1940, 4.1 cents (R. 15). During the year 1941, through the month of November, the average daily prices had been: January, 4.1 cents per pound; February, 4.5 cents; March, 6.2 cents; April, 6.3 cents; May, 6.9 cents; June, 5.8 cents; July, 5.9 cents; August, 6.1 cents; September, 6.0 cents; October, 5.8 cents; November, 5.8 cents (R. 15). During the first week of December 1941, the average daily price was 5.78 cents per pound (R. 15). The average price over the 50-year period preceding the war was 13½ cents a pound (R. 16).

On December 11, 1941, the Office of Price Administration issued Price Schedule No. 52, establishing a ceiling price of 6.75 cents a pound on whole black pepper ex dock or warehouse, New York City (R. 15).[1] This price, the court

[1] The preamble reads as follows (6 Fed. Reg. 6375):

"Pepper is one of the imported commodities which has experienced during the past few months several sharp inflationary price movements. This was followed by a period of relative price stability. With the outbreak of war, the dangers of speculation and inflationary price rises have been magnified, mainly because of the fear of shipping shortages and eventual depletion of stocks. To prevent such unwar-

below has found, was at least the fair market price as of that date (R. 16). On February 3, 1942, the Office of Price Administration amended and reissued this price schedule as Revised Price Schedule No. 52, setting the ceiling price at 6.50 cents per pound (R. 17). To this were added labor charges paid the warehouse for putting the pepper in storage and taking it out, and warehouse storage charges for not more than 30 days, which, on the average, raised the ceiling price for pepper which had been stored in warehouses for 30 days or more to about 6.63 cents a pound (R. 17).[2]

Between December 11, 1941, and February 3, 1942, actual prices did not reach the 6.75 cents price ceiling (R. 16). During January 1942, the highest daily price was 6.45 cents a pound, with the average for the month being 6.41 cents (R. 16). These sales were made by certain traders, importers and grinders, particularly those who held smaller lots, because they realized that it would be impossible for them to obtain a greater

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ranted movements and to hold the stability achieved by the trade, the Office of Price Administration hereby freezes all pepper prices at those which prevailed at New York City on December 8, 1941.

"It is contemplated that, after completion of the studies now being made, a revised price schedule will be issued. If the studies so justify, prices lower than the maximum prices herein will be ordered."

[2] The Revised Price Schedule No. 52 also provided that the maximum price for pepper sold for export might exceed the domestic price by no more than ten percent (R. 17). Appendix C, *infra*, p. 126.

price than the ceiling and they therefore sold rather than hold the pepper indefinitely and incur the cost of holding (R. 16).

Despite the progressively stricter restrictions in 1942 and 1943, imposed for conservation purposes by the War Production Board and later by the Director of Food Distribution, on the deliveries of peppers by packers and receipts by wholesalers and industrial users (R. 17–18), the traders and importers rapidly disposed of their stocks to wholesalers and grinders (R. 16–17, 18). There was progressively less activity from approximately the middle of 1942, as importers, other than Commodities, disposed of their holdings and replenishment of their stocks had become impractical because of war conditions (R. 18). By September 30, 1943, the inventory in the hands of importers had been reduced to about 28,000,000 pounds, of which Commodities continued to retain its original 17,000,000 pounds holding (R. 18; *supra*, pp. 3–4). Between September 30, 1943, and the date of requisition (May 26, 1944), very little whole black pepper was sold out of these inventories (R. 18), and Commodities itself apparently refused to sell any substantial amounts either to the Government or to private purchasers (R. 14, 18, 20).

On October 4, 1943, Commodities, in the first formal protest by anyone against ceiling prices for pepper (R. 35), filed a petition seeking amendment of Revised Price Schedule No. 52 and

requesting the addition of a provision allowing persons who sold pepper ex warehouse to add storage charges computed at the rate of 1/24 cent per pound per month "for the average number of months beyond one month during which the pepper held by the seller at the date of this amendment shall have been owned and stored by him" (R. 20). The Price Administrator, in a letter dated March 11, 1944, denied the petition (R. 20). In the letter, it was pointed out that an evaluation of Commodities' inventory on a "first in, first out" basis showed that the average cost of its inventories on February 3, 1942, was 5.156 cents per pound, and sales of its inventory at that time, at the ceiling price of 6.50 cents plus permissible charges, or 6.63 cents, would have afforded it a gross margin of profit of 20.35 per cent (R. 36–37).[3] Since "the trade reports that a reasonable profit is 10 per cent, the ceiling price established on February 3, 1942 appears as fair and equitable to you" (R. 37). The letter further noted (R. 37):

> Of course, you held your pepper following the original issuance of the regulation fully recognizing the fact that the regulation did not provide for further carrying charges. Grinders have been ready to

[3] Had the inventory been sold on October 4, 1943, the date of Commodities' petition, the Administrator commented, the additional carrying charge of 0.6232 cents per pound would have reduced the gross margin of profit by 8.13 percent (R. 37).

> purchase since the issuance of the regulations. Under all these circumstances, it has been determined that it would be unfair to give you the increase in maximum prices which you request.

Commodities did not appeal from this denial to the Emergency Court of Appeals (R. 35).

On May 29, 1944, the War Department, acting pursuant to the Act of October 16, 1941, as amended, *infra*, pp. 117–118, requisitioned and took possession of 759,750.88 pounds of Lampong whole black pepper, owned by Commodities, subject to the lien of Irving Trust Company (R. 13).[4] Both Commodities and Irving Trust Company rejected the offer of the War Department's "initial compensation officer," the determination of the Chief Requisitioning Officer, Office of Quartermaster

[4] The War Department had previously requisitioned approximately one million pounds of pepper from Commodities. On November 1, 1943, in response to the request of the War Department, Commodities had offered to sell to it one million pounds of pepper at 9¾ cents per pound, subject to obtaining prior approval of the Office of Price Administration (R. 20). No formal action was taken on Commodities' application for such approval since, while the matter was pending, the pepper was requisitioned by the War Department (R. 20). This requisition is now subject to litigation in the Court of Claims. *Commodities Trading Corporation* v. *United States*, C. Cls. No. 47588. The subsequent requisitions from Commodities of whole black pepper, one by the War Department of about 500,000 pounds in April 1945 and the other by the Navy Department of about 300,000 pounds in June 1944, are also subject to litigation in the Court of Claims. *Commodities Trading Corporation* v. *United States*, C. Cls. No. 47587.

General, and the award of the Acting Under Secretary of War of $50,266.76 plus interest at 4% as just compensation for this pepper (R. 14–15). This amount was computed on the basis of the 6.63 cents per pound ceiling price in effect on the date of the requisition (R. 14–15) Fifty per cent of the award was paid to them on November 27, 1945 (R. 15), and on October 3, 1945, this suit for just compensation was filed in the Court of Claims [5] (R. 1).

2. In addition to the foregoing, the Court of Claims also made the following findings: (a) In October 1944 (subsequent to the instant requisition), the Office of Price Administration, after obtaining an informal agreement from Commodities to sell about 7,000,000 pounds at a higher price, increased the ceiling price to ten cents per pound (R. 19). In June 1945, Commodities sold approximately 124,000 pounds of pepper to consignees in Puerto Rico at various prices averaging 14,19 cents per pound (R. 19); the then Price Schedule permitted an exporter to add to the ten cents domestic ceiling, his usual pre-war export mark-up plus 25% thereof (R. 19). In March

[5] Approximately three months after the institution of this action, Commodities was dissolved by the voluntary action of its stockholders (R. 12). Pursuant to the plan of dissolution, the company's assets, including its claim in this proceeding, were distributed in kind to the stockholders, in proportion to their holdings (R. 12–13). The stockholders, upon being permitted to intervene in the Court of Claims as parties-plaintiff in this proceeding, have adopted the petition therein filed and the proceedings had (R. 7–10, 13).

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1946, again following negotiations between Commodities and the Government, the ceiling price was increased to 16 cents per pound, and thereafter Commodities sold its remaining inventory of about 3,000,000 pounds at that price (R. 19). After the removal of price ceilings in August 1946, pepper was actively sold at 50 to 60 cents per pound and upward, and at 40 cents a pound and upward for future delivery in three or four months (R. 18).

(b) During the years 1943 and 1944, spice dealers manufactured and sold in substantial quantities synthetic or imitation pepper, at a ceiling price of 16 cents a pound (R. 18–19). Imitation pepper, made up of about one-fourth or one-fifth real ground black pepper, the remainder being ground parched corn, wheat, cotton seed hulls, or other neutral agent sold for approximately 16 cents a pound (R. 19). The ceiling price for ground black pepper was then 12½ cents per pound (R. 19).

(c) Next to Sumatra, British India is the largest producing country of black pepper (R. 21). Although it consumes approximately 75 percent of its pepper, exporting the balance, the Allied Food Commission, prior to 1944 and in 1944, did allocate 10,000,000 pounds of Indian pepper for the United States (R. 21). During 1944 the price of Indian pepper delivered in New York, including insurance and freight paid to New York, fluctuated as follows:

	Cents		Cents
February	21.25	July	19.71
March	21.20	August	19.40
April	18.55 to 19.00	September	16.90
May	20.00	October	19.76
June	20.90		

However, because Revised Price Schedule 52 provided that no one could purchase or import pepper at higher than the 6.5 cents per pound ceiling price, American importers were unable to take advantage of the allocation of British pepper (R. 21).

(d) The pepper requisitioned by the Government is identified by lot numbers from purchases by Commodities from October 1933 to January 1936, amounting to 5,805 bags, or 773,201 pounds net, at an invoice cost of $53,143.13, an average of 6.21046 cents per pound (R. 21). By the time it was requisitioned, it had been carried by Commodities for periods averaging nine years and 4½ months, and its total cost to Commodities including carrying charges, allowance for shrinkage and for general administrative expense, but excluding officers' salaries, supervision and purchasing expenses, resulted in an average cost to Commodities of 12.7 cents per pound (R. 21–22). This cost included substantial charges for storage, insurance, taxes, and financing incurred during the period after establishment of the ceiling price during which Commodities refused to make sales (R. 21–22).

(e) Because of the nature of the pepper vine and the conditions under which it is grown in

Sumatra, there is about a five-year time lag before prices can affect the crop (R. 22). The reduction in crops in 1937, 1938, 1939 had had, by 1941, sufficient effect in raising prices so that new plantings might have been made by 1942 (R. 22). "If there had been no war in 1941, it is probable that production of pepper in Sumatra would have decreased each year after that until about 1945 or 1946 when the new plantings would have begun to bear. This decreased supply during the period from 1942 to 1945 or 1946 would have had effect in raising pepper prices in the United States" (R. 22–23).

3. In determining just compensation, the Court of Claims refused to be governed by the concurring opinion of Mr. Justice Reed in *United States* v. *Felin & Co.*, 334 U. S. 624, 642, and rejected the applicable maximum price as the measure of just compensation, because the property requisitioned was non-perishable (R. 24–25). "This is so because the owner of nonperishable property has the right to hold it until after restrictions are removed and then to sell it" (R. 25). It held that because of the owner's right to retain the property, just compensation must be fixed on the basis of "retention value," which it considered particularly applicable here, since Commodities, being an "investor" rather than a trader in pepper, "had accumulated its stock in the expectation that there would be a considerable rise in the price of pepper, at which time it ex-

pected to dispose of it" (R. 25). In arriving at retention value, the court considered the "very great rise in price [which] was inevitable upon the removal of restrictions" (R. 26), and the rise in price, which but for the war, would probably have resulted due to curtailment of planting (R. 25–26). It further considered the cost of the pepper to Commodities and the sales subsequent to the requisition at the increased ceiling prices and concluded that the fair value of the pepper on May 26, 1944, the date on which it was requisitioned, was $113,962.63, or 15 cents a pound (R. 26–27). Judge Madden dissented on the ground that the ceiling price was the proper measure of just compensation (R. 28–30). Chief Judge Jones did not participate (R. 30).

SPECIFICATION OF ERRORS TO BE URGED IN NO. 156

The Court of Claims erred:

(1) In failing to hold that the maximum price in effect at the time the pepper was requisitioned, validly established by the Office of Price Administration, was the proper standard of just compensation therefor.

(2) In holding that the determination of just compensation in time of war or national emergency must take into account "the plaintiff's right to hold its property until restrictions on its disposition are removed" and "his right to hold his property until he can get for it whatever any one is willing to pay."

(3) In fixing as just compensation for the pepper requisitioned an amount in excess of the maximum price therefor at the time of the requisition, as fixed by the regulations of the Office of Price Administration.

(4) In entering judgment for respondents in the amount for which it was entered.

SUMMARY OF ARGUMENT

On the requisition by the War Department of 760,000 pounds of its 17,000,000-pound stockpile of whole black pepper, in May 1944, Commodities was offered, and rejected, the valid O. P. A. ceiling price of some 6.63 cents per pound. The Court of Claims has disregarded the maximum price and awarded 15 cents per pound, taking into account the sums which the owner could have secured for the pepper had it been permitted to hold it until after wartime restrictions had been removed. Commodities claims that 22 cents should have been allowed. It is our argument that (a) the lawful ceiling price constitutes the proper measure of just compensation, (b) in any event, the Court of Claims' findings do not support its award of 15 cents, and (c) Commodities is not entitled, on any theory, to an increased judgment.

I

A. The Fifth Amendment protects the fundamental right to be free of confiscation, but it does not provide any specific measure, amount, or rule,

nor does it demand that the subsidiary standards which are normally used during times of peace must be applied in wartime. The only basic constitutional criterion for awards to an owner of requisitioned property is that his compensation be fair and just, both to him and the public, in the prevailing circumstances. And the circumstances and conditions of wartime necessarily affect the determination of what is a "just" award for war takings.

B. Valid wartime price ceilings normally satisfy this constitutional standard, for, in the absence of a successful challenge in the Emergency Court of Appeals which was available for that purpose, they must be accepted, under the Price Control Act, as "generally fair and equitable," and by their very nature they were also fair and equitable to most individuals. Unless a particular owner can present convincing proof that special circumstances make application of the ceiling price unjust and unfair to him, that price should be the maximum measure of just compensation for a taking for war purposes. The fact that prices are limited by the ceiling, and the market is not "free," is no obstacle to this result, for valid legal restrictions have always been taken into account in determining "value" or just compensation. The "loss" suffered by the owner because he does not receive an award in excess of the ceiling does not differ from that suffered, in wartime, by all others selling goods subject to price

control. This is a "burden of common citizenship" in wartime, and the owner of commandeered property should not be singled out to be recompensed for this deprivation.

On the other hand, maintenance of an effective price control system would be seriously endangered if sellers of products needed by the Government could count on securing over-ceiling prices by insisting on requisition. For, during a war period, Government buying dominates the market, and there is little promise of restricting prices in general to reasonable levels if prices on sales to the Government are not effectively monitored.

C. Commodities cannot rightfully complain that the pepper ceiling price was unfair as applied to it. At the time it was imposed in December 1941 and February 1942, the ceiling price admittedly equalled the free market price, and was higher than the average price for the preceding six years. It was never challenged in the Emergency Court of Appeals. After its establishment, very substantial trading occurred at this ceiling price, so that the American stockpile of 78,000,000 to 100,000,000 pounds (in March 1942) was reduced to 28,000,000 pounds by September 30, 1943. Trading ceased because Commodities, and a few like-minded holders, refused to sell, and further imports from Indonesia were prevented by the Japanese occupation of that territory. Commodities insisted on retaining its 17,000,000 pounds,

and as a result by September 1943 it held 60% of the supply available in this country.

In these circumstances, the ceiling price reflected a fair market value which is binding on Commodities even under the conventional standards of just compensation. The ending of active trading should, in fairness, be disregarded, because it was brought about by the deliberate action of Commodities, which had made itself a near-monopolist, and resort should be had to the earlier active market constituted by owners willing to sell and purchasers willing to buy—a market which indicates that the price ceiling did constitute a fair basis for trading. Any increase over the ceiling price, if it were allowed, would come about because of the combination of the wartime scarcity of pepper with Commodities' powerful near-monopoly, and cannot be viewed as a fair or just value for which compensation should be made.

Moreover, the Price Administrator specifically found that the ceiling was fair and equitable as applied to Commodities, and nothing is presented here to invalidate that administrative conclusion. Most of Commodities' arguments really challenge the price ceiling as a whole, and those objections are not open here, since neither it nor any other holder of pepper sought review in the Emergency Court. The one individual complaint is that the cost of its pepper far exceeded the ceiling price, but, even if individual cost were a proper factor to consider where a market has existed, the claim

would not be valid. For the high costs Commodities pleads stem from the double facts that (a) Commodities itself chose the particular bags of pepper to be delivered in response to the requisition, and it selected its high-cost pepper, and (b) its policy for some years appears to have been to retain its higher-cost goods (purchased mostly from 1933 to 1936) and to dispose of the lower-cost supplies (purchased from 1937 to 1939), so that at the time of requisition its pepper then on hand had a particularly high average cost. On the fairer "first-in, first-out" basis used by the Price Administrator, Commodities' cost would be much lower, and the claim of special unfairness could hardly be sustained.

D. Despite all these facts and factors, the Court of Claims thought that the ceiling price should be rejected because the owner was entitled to be compensated for this non-perishable property's "retention value", i. e., the price which it would secure after the lifting of controls. But, in our view, "retention value" has no proper place in just compensation determinations for war takings. In the first place, it is far too speculative, since the course of the war, the duration of controls, general post-war conditions, and the particular owner's post-war circumstances cannot be gauged at the time of taking, except by inspired prophecy. That is particularly true here, where the post-war price of pepper—under Commodities' own theory—would depend largely on the

then unknown state of production in Japanese-occupied Dutch East India. Secondly, "retention value" seems normally to be rejected in eminent domain proceedings even in peacetime. If, for instance, all of Commodities' pepper had been taken at the market price in November or early December 1941—before controls were instituted—it could not claim this type of "value", under the traditional rules, although it clearly intended to retain its pepper for still higher prices.

Above all, inclusion of "retention value" is unfair to the public and to other owners. It is unfair to the public because this value-increase (i. e., the anticipated post-war price rise) is usually directly attributable to the tensions, dislocations, and emergency conditions of wartime, and it is not fair to force the Government to allow the owner to take an individual benefit, at the general expense, from this war-created increment in value—as Commodities has been allowed here. Consideration of "retention value" is, moreover, unfair to other traders and owners—like the many smaller holders of pepper who sold at ceiling prices—who do not have the resources to keep their goods for indefinite periods, and therefore cannot claim compensation on this account. The result is that the strong are reimbursed for their strength and for their ability to withstand the pressures of the wartime economy.

Finally, exclusion of this anticipated increment is not unfair to the owner. The deprivation he suffers, if there be any, is wholly comparable to, and no greater than, the non-compensable losses endured by many segments of the nation, as a result of the total mobilization of effort, manpower, and property required to prosecute the war. Selective service; the allocations and priorities systems; universal price and rent control; limitations on wages, strikes, and job freedom; contract renegotiation and royalty adjustment—all bring certain hardships or losses of anticipated benefits. The property owner's loss of an anticipated post-war price-increase is of the same order, and frequently less severe in its incidence. In these conditions of wartime life, and in view of the general restraints on freedom and action, it cannot be deemed unjust to limit his compensation to the validly-established, generally fair and equitable, price ceiling. Indeed, the intrinsic fairness of excluding value-increases due to the war is strongly attested by the wartime eminent domain legislation of England, Canada, Australia, New Zealand, and France—each a democratic nation which has long followed the principle of awarding just compensation for requisitioned property.

E. Acceptance of the price ceiling as the proper measure of just compensation would not invade the judicial function in requisition pro-

ceedings. Even if one accepts the principle that the courts alone have the power to develop and establish the rules and measures governing eminent domain awards, there is nothing to prevent the courts from independently accepting and using valid price ceilings.

II

Commodities' claim (in No. 163) that it is entitled to an award of 22 cents per pound should be rejected, regardless of whether the Court accepts our view that the price ceiling is determinative. In fact, the Court of Claims' findings, and the evidence, do not even support the allowance of 15 cents. None of the separate factors brought forth by Commodities justifies either its additional claim or the extent of the lower court's award.

A. Much is made of the court's failure to accord enough weight to the so-called normal "cycle" of pepper prices, as showing what prices would have been if there had been no war. Passing the hypothetical nature of the inquiry, the theory is demonstrably inconclusive, and cannot be used with any degree of accuracy to reconstruct the level of 1944 prices, absent the war. The Court of Claims gave the theory too much, not too little, consideration.

B. Commodities' claim of high costs rests, as we have said, largely on its own choice of the

higher-cost bags of pepper to retain and to furnish to the Government, as well as on cost-elements which are plainly not includable.

C. Its demand for a further allowance on account of "retention value" (assuming that this factor is to be considered at all) exposes no more than a limited disagreement with the lower court, in which the court's evaluation is at least as reasonable and realistic as Commodities'.

D. After the ceiling price was raised to 10 cents in October 1944, and to 16 cents in 1946—as a last resort in the effort to induce Commodities to dispose of its stocks—Commodities did make sales, but the circumstances in which the price levels were raised, and the pressures exerted by Commodities' monopoly position, bar the use of these sales as the standard for measuring just compensation in this case, so far as the Government is concerned. Commodities, on the other hand, did agree to make substantial sales at these prices—thus indicating its own belief that the prices were not unreasonable or confiscatory.

E. Pepper was offered for sale in India for delivery in New York, during the war, but could not be lawfully imported into this country because of our price ceilings, and none was brought in for domestic use. Accordingly, Commodities' reliance on the Indian price is baseless, for American buyers and sellers could not avail themselves of this source.

F. Finally, there is no merit to the various contentions based on the special ceiling prices for pepper which co-existed with the general maximum which was admittedly applicable to Commodities. These other maxima are either clearly inapplicable; or there is an entire absence of proof that Commodities could bring itself within the special classes permitted to sell at those prices; or there is a similar failure to disprove the probable fact that if Commodities had availed itself of those prices it would have incurred counter-balancing costs which would have to be taken into account in this proceeding.

ARGUMENT

This case, like *United States* v. *Felin & Co.*, 334 U. S. 624, involves the soundness of a Court of Claims' judgment fixing just compensation for property requisitioned by the Government for war purposes at an amount in excess of the price-ceiling legally established by the Office of Price Administration. In May 1944, the War Department, acting as the President's delegate under the Requisitioning Act of 1941, took 759,750.88 pounds of Commodities' 17,000,000 stockpile of whole black pepper, an imported spice which had become very scarce because the Japanese had overrun the principal sources of supply. During this period of increasing shortage, Commodities refused to sell its holdings, while most other owners of pepper disposed of their stocks. As a result, at the time of requisition Commodities

owned more than 60% of the total domestic stockpile, and the Army was forced, in order to procure its supply, to invoke the eminent domain power. The general O. P. A. maximum price of 6.63 cents per pound for pepper, which the Government offered to pay Commodities as just compensation, was never challenged in the Emergency Court of Appeals; when established, early in 1942, it reflected the free market price, and it was the price at which some 80 to 90% of the domestic holdings of pepper—other than those owned by Commodities—were thereafter bought and sold.

The rejection by the Court of Claims of this price ceiling as the correct measure of just compensation, we believe, to be in conflict with the principles of fairness and justice which, under the Constitution, are decisive in making awards for compulsory takings. Point I deals with this serious error of the lower court. In Point II, we shall show that, in any event, Commodities cannot rightfully claim, as it seeks to do in No. 163, an amount greater than the 15 cents per pound allowed below, and also that the court's findings do not support even that figure.

I

THE MAXIMUM PRICE VALIDLY FIXED BY THE OFFICE OF PRICE ADMINISTRATION WAS THE PROPER MEASURE OF JUST COMPENSATION FOR COMMODITIES' PEPPER REQUISITIONED FOR WAR USES

A. THE CONSTITUTIONAL STANDARD OF JUST COMPENSATION

The central conception of the Fifth Amendment's prescription that "just compensation" be paid by the public when it requisitions private property is that the owner's goods must not be confiscated without payment, that the sovereign must pay a reasonable award for the property, and that compensation must be made which is fair and just both to the owner and to the public. Cf. *Lynch* v. *United States*, 292 U. S. 571, 579–580. "The law of eminent domain is fashioned out of the conflict between the people's interest in public projects and the principle of indemnity to the [land]owner" (*United States ex rel. T. V. A.* v. *Powelson*, 319 U. S. 266, 280), and a balance is struck "between the public's need and the claimant's loss." *United States* v. *Toronto, Hamilton and Buffalo Nav. Co.*, this Term, No. 39, decided December 12, 1949, slip op., p. 5. The constitutional requirement of "just compensation is a practical conception * * *" (*United States* v. *Felin & Co.*, 334 U. S. 624, 641), and in developing the governing judicial measures, this Court has been quick to mold the rules to conform to its ideas of

fairness and substantial justice. *United States* v. *Miller*, 317 U. S. 369, 373, 374–375; *United States ex rel. T. V. A.* v. *Powelson, supra; United States* v. *Toronto, Hamilton and Buffalo Nav. Co., supra;* cf. 1 Bonbright, *The Valuation of Property* (1937), p. 409, and the whole of ch. XVI ("Valuation Under the Law of Eminent Domain"). In particular, the Court has endeavored to establish rules which are fair not only to property owners but to the public as well. *Searl* v. *School District, Lake County*, 133 U. S. 553, 562; *Garrison* v. *City of New York*, 21 Wall. 196, 204; *Bauman* v. *Ross*, 167 U. S. 548, 574; 2 Lewis, *Eminent Domain* (3rd Ed., 1909), p. 1175.

The Constitution does not incorporate any particular standard or measure of payment—be it "market value" or "value" of any type[6]—and,

[6] "Nowhere in the Constitution, however, is there any definition of 'just compensation'; and its identification both with the principle of indemnity and with an award based on the 'fair value' of the property is purely a matter of judicial interpretation or lawmaking." 1 Bonbright, *The Valuation of Property* (1937), p. 409.

The debates on the adoption of the Fifth Amendment cast no light on the meaning which the "just compensation" clause was thought to have. James Bradley Thayer [1 *Cases on Constitutional Law* (1895), p. 945] suggests that the pertinent writings of Grotius and other early publicists "bring out the conceptions upon this subject which the framers of our first constitutions entertained." Grotius says (in general terms which contain no reference to particular measures like "market value"), that in exercise of the power of eminent domain, "compensation from the public funds [should] be

as recent opinions emphasize, mechanical, mathematical, or routine standards often have been rejected because of the demands of equity. *United States* v. *Miller, supra,* at 373–377, for instance, summarizes the conventional judicial rules, with great stress on the requirements of fairness; even in dealing with the accepted measure of "market value," the Court underscores the concept of "'*fair*' market value," and points out that "* * * strict adherence to the criterion of market value may involve inclusion of elements which, though they affect such value, must *in fairness* be eliminated in a condemnation case * * *" (317 U. S. at 375, italics sup-

made, if possible, to the one who has lost his right," and the "state is bound to make good at public expense the damage to those who lose their property." *De Jure Belli ac Pacis*, Bk. II, ch. 14, sec. 7, Bk. III, ch. 20, sec. 7 (Classics of Int. Law trans. of 1646 ed.). Vattel states that "justice requires that compensation be made to the community or the individual from the public treasury; and if the treasury cannot meet the charge upon it, all the citizens are bound to contribute to it for the burdens of the State should be borne equally by all, or in just proportion." *Le Droit des Gens*, Bk. I, ch. 20, sec. 244 (1758). Blackstone refers—somewhat overbroadly—to the "great * * * regard of the law for private property," and says that the sovereign does not act "by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained," which he sums up as "a reasonable price." I *Commentaries* 139 (Chitty's ed. 1866). See, generally, on early conceptions of eminent domain, Grant, *The "Higher Law" Background of the Law of Eminent Domain* (1931), 6 Wis. L. Rev. 67; Lenhoff, *Development of the Concept of Eminent Domain* (1942), 42 Col. L. Rev. 596.

plied). Similarly, *United States ex rel. T. V. A.* v. *Powelson, supra,* at 279–280, refers to considerations of "equity and fair dealing" in determining proper measures of compensation. See also *United States* v. *Petty Motor Co.,* 327 U. S. 372, 373–378; *United States* v. *Felin & Co., supra; United States* v. *Toronto, Hamilton and Buffalo Nav. Co., supra,* slip op., pp. 5, 8. At the last Term, the Court had the occasion to summarize this thesis in *United States* v. *Cors,* 337 U. S. 325, 332:

> The Court in its construction of the constitutional provision has been careful not to reduce the concept of "just compensation" to a formula. The political ethics reflected in the Fifth Amendment reject confiscation as a measure of justice. But the Amendment does not contain any definite standards of fairness by which the measure of "just compensation" is to be determined * * * The Court in an endeavor to find working rules that will do substantial justice has adopted practical standards, including that of market value.

Thus, the only fundamental measuring rod laid down by the Fifth Amendment—and, consequently, the only basic standard to be applied in this case—is that the compensation to be paid to the owner be fair and just both to him and to the public. And to the extent that the subsidiary standard of "market value" is to

be used, it must be a "*fair* market value," from which all elements tending toward an inequitable result have been abstracted.

What is fair and just both to the public and to the owner depends, in large part, upon the circumstances and conditions prevailing at the time of taking. During a period of total war—when the efforts of the entire country are directed from normal peacetime pursuits to the all-out effort successfully to protect the nation, its peoples and property, from enemy aggression—the elements to be weighed and evaluated in determining what is equitable will differ sharply from the normal criteria. The Government, of course, recognizes that the country's participation in a war does not suspend the Fifth Amendment's requirement that just compensation be paid for requisitioned property. However, the philosophy underlying the Fifth Amendment's prescription requires, in war-taking cases, a close scrutiny of the subsidiary rules which have been evolved for the fixing of just compensation in peacetime, against the ultimate constitutional standard of fairness. In wartime, a new and different set of considerations comes into play, considerations which, in our view, require that the conflict of public *vis a vis* private interests, which the just compensation conception is designed to resolve, should be resolved somewhat differently than it would be in times of less stress and public urgency.

B. VALID CEILING PRICES NORMALLY SATISFIED THE CONSTITUTIONAL STANDARD OF JUST COMPENSATION

1. *Ceiling prices were fair and equitable, both generally and, in most instances, to the particular individual.*—Ceiling prices fixed by the Price Administrator under the Emergency Price Control Act normally met the basic constitutional requirement of fairness and equity, for under Section 2 (a) of that Act a ceiling price fixed by the Price Administrator was required to be that which "in his judgment will be generally fair and equitable." Section 2 (a), 50 U. S. C. App. 902 (a). The prices were to be fixed with "due consideration" given to the prices in a normal market, *i. e.*, "the prices prevailing between October 1 and October 15, 1941 (or if * * * the prevailing prices between such dates are not generally representative because of abnormal or seasonal market conditions or other cause, then to the prices prevailing during the nearest two-week period in which, in the judgment of the Administrator, the prices for such commodity are generally representative)."[3] In these circumstances, as the Court of Claims said in an earlier case in

[3] Section 2 (a) goes on to require the Administrator to "make adjustments for such relevant factors as he may determine and deem to be of general applicability, including the following: Speculative fluctuations, general increases or decreases in cost of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of the commodity or commodities, during and subsequent to the year ended October 1, 1941."

which it independently concluded that the maximum price constituted the proper award, "that the ceiling price fixed by the Price Administrator happens to be the [just compensation] found by the court, is not surprising in view of the statutory basis on which the Administrator is bound." *Walker* v. *United States*, 105 C. Cls. 553, 580.

The Price Control Act further provided for the filing of complaints, first with the Price Administrator (Section 203, 50 U. S. C. App. 923), and if rejected by the Administrator, with the Emergency Court of Appeals (Section 204, 50 U. S. C. App. 924), questioning whether the ceiling price adhered to the statutory standard, *i. e.*, whether it was "generally fair and equitable." Such a challenge could be made not only immediately after a price ceiling or a maximum price regulation was issued, but at any later time if subsequent events showed that it no longer satisfied the statute's requirement. *Schanzer* v. *Bowles*, 141 F. 2d 262 (Em. C. A.); *Capitol Foundry Co.* v. *Bowles*, 146 F. 2d 855, 857 (Em. C. A.); cf. *United States* v. *Sanitary District of Chicago*, 149 F. 2d 951, 955 (C. A. 7).* In the absence of a successful direct attack upon the

* On the continuing jurisdiction of the Emergency Court of Appeals, see its recent opinions in the subsidy cases: *Belle City Packing Co.* v. *R. F. C.*, 169 F. 2d 413, 414; *Wm. Schluderberg-T. J. Kurdle Co.* v. *R. F. C.*, 169 F. 2d 419, 420; *Merchants Packing Co.* v. *R. F. C.*, No. 487, decided September 29, 1949; *Duncan Coffee Co.* v. *R. F. C.*, No. 500, decided December 16, 1949. Cf. *Woods* v. *Hills*, 334 U. S. 210.

ceiling price (in the Emergency Court of Appeals, or, on certiorari, in this Court), it was to be considered valid in all courts, state and federal.[9]

It is true that the prices so fixed were held to satisfy the statutory requirement if they were fair and equitable to the industry generally, irrespective of their impact upon a particular individual (see, *e. g.*, *Bowles* v. *Willingham*, 321 U. S. 503, 516–518; *Wilson* v. *Brown*, 137 F. 2d 348 (Em. C. A.); *Fournace* v. *Bowles*, 148 F. 2d 97, 101 (Em. C. A.), certiorari denied, 325 U. S. 884), but it was the abnormal case, characterized by special or unique circumstances, in which a ceiling price which was "generally fair and equitable" was not also fair and equitable to a particular property owner or vendor. Especially where, as in the present case, the maximum price was di-

[9] Section 204 (d) of the Price Control Act (50 U. S. C. App. 924 (d)) provided, in part:

"The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule or to restrain or enjoin the enforcement of any such provision."

rectly based on an active and widespread market in this very commodity, would it be unlikely that a valid ceiling would be unjust to a particular individual. *Infra,* pp. 45–57. In addition, provisions were made in many maximum price schedules for special adjustments and relief of those individuals who could show that the general price ceiling adversely affected their particular operations. *Armour & Co. of Delaware* v. *Brown,* 137 F. 2d 233, 236, fn. 2 (Em. C. A.); see, for example, the regulations involved in *Goodman* v. *Bowles,* 138 F. 2d 917 (Em. C. A.); *Capitol Foundry Co.* v. *Bowles,* 146 F. 2d 855 (Em. C. A.); *Armour & Co.* v. *Bowles,* 148 F. 2d 546 (Em. C. A.); *American Brake Shoe Co.* v. *Bowles,* 151 F. 2d 195 (Em. C. A.); see, also, OPA Procedural Regulation No. 1, secs. 1300.35–1300.41, 7 Fed. Reg. 971, 974–5 (issued February 12, 1942); Revised Procedural Regulation No. 1, secs. 1300.9–1300.23, 7 Fed. Reg. 8961, 8962–3 (issued November 2, 1942).

Thus, the maximum prices established by the O. P. A., which were not overthrown on appeal, bear the unquestioned stamp of validity. By the same token, they were also "generally fair and equitable" to the particular trade or industry at any given time, and, except in unusual circumstances, they were likewise "fair and equitable" to the individual seller or property owner. Concomitantly, they furnished, of course, the only price at which any person subject to the maximum price regulation could lawfully sell his products,

and also validly limited the sums he could properly obtain on the market, or otherwise, by a voluntary sale.

2. *Valid price ceilings should be adopted as the normal maximum measure of just compensation for wartime takings.*—There is no obstacle, in our view, to adoption of valid price ceilings as the normal maximum measure of just compensation for wartime takings, and there are many good reasons why this should be done.[10] The lawful ceiling price should be decisive unless the owner can show that, even though it must be regarded as generally fair and equitable and therefore binding, it is not fair and just in its individual application to him, because of certain special circumstances. Absent such unique proof, payment of the ceiling price is fair and just to the owner, the public, the Government, and to other property-owners or traders. The loss or deprivation suffered by the

[10] At the outset, we may point out that there is no past decision of this Court rejecting valid general price ceilings as a measure of just compensation. *United States* v. *New River Collieries Co.*, 262 U. S. 341, which is sometimes cited as having ruled to that effect, involved an active and free export market in which the owner customarily traded and in which it would have sold the coal if it had not been requisitioned. This export market was entirely uncontrolled and was readily available. Only the lower domestic market, in which the owner usually did not trade, was controlled. On the other hand, the companion case of *L. Vogelstein & Co.* v. *United States*, 262 U. S. 337 (discussed below at pp. 54–55; 70–71), involved a controlled-price situation closely approaching that of a valid general price ceiling, and the controlled price was held the measure of just compensation. The cryptic opinion in *Davis* v. *Newton Coal Co.*, 267 U. S. 292, does not appear to have been intended to pass on this issue.

owner through use of the maximum as the measure of his award is of exactly the same order as the unreimbursed loss which comes to many elements of the national community during a grave and serious war, and compensation should not be made for it to owners of requisitioned property alone.[11] We believe that this should be the

[11] We do not urge that there is anything in the Emergency Price Control Act *requiring* that ceiling prices be used as the measure of just compensation. Section 4 (d) of the Act, 50 U. S. C. App. 904 (d), provides that "Nothing in this Act shall be construed to require any person to sell any commodity or to offer any accommodations for rent." On the other hand, there is nothing in the Act, or its legislative history—or in the general requisitioning act of 1941 and 1942 (involved here), or the legislative history of that statute—*preventing* the use of ceiling prices, *qua* ceiling prices, as the proper measure of just compensation, if the Fifth Amendment's prescription is satisfied by awards limited by a valid maximum price. See Supplemental Brief for the United States, in *United States* v. *Felin & Co.*, 334 U. S. 624, Oct. Term, 1946, No. 862, Oct. Term, 1947, No. 17. See *infra*, pp. 88–92.

As we understand the remark in *Bowles* v. *Willingham*, 321 U. S. 503, 516–517, that price control did not involve a "taking" of property, the Court pointed out no more than that price ceilings which were generally fair and equitable might be unfair and inequitable as applied to particular landlords or vendors, but that this did not invalidate the ceiling as a regulatory measure, though it might affect the use of the ceiling as the measure of just compensation in a requisition directed against that particular person. The Court did not hold, or intimate, that valid maximum prices—which were necessarily fair and equitable in general—could not be the normal measure of compensation in requisitions directed against those many persons to whom the ceiling was also individually fair and equitable, or to whom it would not be unjust to apply the ceiling. Cf. *Block* v. *Hirsh*, 256 U. S. 135, 156–8, and *Federal Power Comm.* v. *Hope Natural Gas Co.*, 320 U. S. 591, both cited in the *Willingham* case, *supra*.

rule regardless of whether or not active trading is occurring, at the ceiling price, at the time of taking, and whether or not the ceiling price equalled the "free market price" at the time it was imposed.[12]

(a) The fact that there is a legal limitation on the upward movement of price, and that the market is not "free," does not, in itself, detract from the propriety of using the ceiling to determine the prescribed compensation. The maximum is, at least, generally fair and equitable; by definition, it is a lawful restriction; it is what the owner would obtain from a private buyer; it is the price he would have to pay for a replacement, if one were available; and it necessarily enters into the then value of the requisitioned property, on any theory of value. That it happens to be a "legal control", rather than a physical or economic restriction, does not set it apart, or permit

[12] In the present case, it is clear that the ceiling price did approximate the market price at the time it was imposed, that there was very substantial trading at the ceiling price for at least several months, and that the cessation of active trading occurred, not because the price was no longer generally fair and equitable, but because (a) large holders like Commodities, who held the bulk of the remaining stocks, refused to sell, and (b) there were no new imports of pepper into the United States during the war. *Supra*, pp. 4–8. We show below (*infra*, pp. 45–66) that the ceiling price was not only generally fair and equitable, but also fair and equitable to Commodities, and also urge (*infra*, pp. 45–57) that if the conventional standard of "fair market value" be followed, the ceiling price is the proper measure in this particular case.

it to be disregarded. There are in actual fact very few market places where there is the free market said to be visualized by Adam Smith—a market where the completely free interplay of supply and demand sets the price. There are usually economic rigidities as well as government-imposed conditions which result in a limitation on the value of the property. The value of real estate, for example, may be severely curtailed and limited by government-prescribed restrictions on its use, in the form of zoning ordinances. The just compensation for such property takes account of this limitation and reflects the reduced value. Cf. *United States ex rel. T. V. A.* v. *Powelson*, 319 U. S. 266, 284; *Reichelderfer* v. *Quinn*, 287 U. S. 315, 323; see R. 30, Judge Madden dissenting.

In a war period, governmental restrictions of all kinds are the order of the day. As Judge Learned Hand said, in giving full effect to war-time priorities regulation in the condemnation proceeding of *United States* v. *Delano Park Homes, Inc.*, 146 F. 2d 473, 474 (C. A. 2):

> We cannot agree that the judge should have refused to consider the effect of "priorities." Nobody suggests that an owner whose land is not condemned, has any claim upon the United States because he cannot employ it profitably until the system ends. Yet to appraise the land without any deduction for a period during which it will bring in no income, is to re-

> imburse the owner pro tanto; a discount measured by commuting the losses, de die in diem, is necessary to avoid putting into a preferred class owners whose lands happen to be condemned, as against those who must bear the deprivation without relief. Otherwise condemnation will prove a bonanza. * * * In each case [referring to two earlier district court cases] the district court had assimilated the situation to that of a case where the market is upset by temporary variations of supply or demand, where it is indeed true that the immediate prices are not the proper measure of value. Certainly, when an owner can hold his property until the market recovers, it is unjust to allow him only current prices, for presumably he will wait for a recovery before disposing of his goods. Whether the same reasoning applies when he cannot wait, is another question; not decided, so far as we know. However that may be, when competent authority has fixed prices at a maximum, or has denied owners some specific use of their property, it is patently a disregard of its authority, either indirectly to allow a higher price on condemnation, or to allow the price to be figured in disregard of the limitation imposed. * * *

Such "governmental restrictions, unquestionably lawful and general in their scope * * * [are] actualities which circumscribed the market * * * Whatever may have been plaintiffs'

damage because of these restrictions, it may not be reflected in fixing just compensation for the taking." *Graves* v. *United States*, 62 F. Supp. 231, 233 (W. D. N. Y.). This is so, because "[a] distinction must be drawn between the consequences of a seizure and the consequences of the imposition of lawful war-time restriction on price, since the law is now well settled that the imposition of use and price is a proper exercise of sovereign war powers and that the resulting market conditions are lawful * * *. And since they are both lawful, actual and real, they must control." *Cudahy Bros. Co.* v. *United States*, 155 F. 2d 905, 907 (C. A. 7).[13]

The failure of the owner to secure the putative war-inflated price which he could get in the absence of price ceilings—and absent any system for controlling inflation—thus stems, not from the fact that his property was requisitioned, but rather is brought about by the imposition of the lawful price ceiling, and hence is not recoverable under our system of law. *Cf. Kimball Laundry Co.* v. *United States*, 338 U. S. 1, 5; *Yakus* v. *United States*, 321 U. S. 414; *Bowles* v. *Willingham*, 321 U. S. 503; *Omnia Commercial Co.* v. *United States*, 261 U. S. 502; *Morrisdale Coal*

[13] See also *Louisville Flying Service* v. *United States*, 64 F. Supp. 938 (W. D. Ky.); *Lessner Plumbing & Heating Co.* v. *United States*, 64 F. Supp. 931 (S. D. N. Y.); cf. *Wilson Athletic Goods Mfg. Co.* v. *United States*, 161 F. 2d 915, 917–918 (C. A. 7).

Co. v. *United States,* 259 U. S. 188; *Block* v. *Hirsh,* 256 U. S. 135, 157–8; see *Nortz* v. *United States,* 294 U. S. 317, 329–330. Like any "loss due to an exercise of the police power," it should be "properly treated as part of the burden of common citizenship." *Kimball Laundry Co.* v. *United States, supra.* (See also *infra,* pp. 77-88). Nor would the owner be in a better position if he should limit his claim to a hypothetical sum which he judges he would have received from private purchasers had there been no war at all. The fact is that the war did intervene, and its existence necessarily affects the worth of his property, and what he can get for it. His inability to obtain on condemnation a theoretical peacetime price, if it be higher than the ceiling, does not differ from the similar inability of other vendors who sell voluntarily.

In short, there is no unfairness to the owner in excluding all consideration of a possible excess over the controlling price from the just compensation determination, since his claim for such excess arises solely because of the accident that his particular property, no more affected by the regulation than the property of all other persons, was requisitioned by the Government. Payment of the ceiling price will bring exactly the price which the goods would have brought in the market, or from a private person. Certainly it is unfair to disregard the ceiling price, and to award compensation on the basis of the prices or values which would have existed in its absence,

at the behest of persons who have refused to sell to the Government, while denying similar relief to the much larger class of persons who have voluntarily delivered their goods to the Government, or to other purchasers, and thereby in sales for private account have suffered the very same "losses." The owner of requisitioned property is not entitled to compensation for his unwillingness to sell to the Government; nor does he merit reimbursement for deprivations which everyone else is forced to bear without monetary recompense. Cf. *United States* v. *Sanitary District of Chicago*, 149 F. 2d 951, 955 (C. A. 7). See, also, Note, 60 Harv. L. R. 132, 136–137.

(b) On the other hand, permitting the owner of requisitioned property to receive more than the ceiling price would serve to frustrate the congressional purpose to stabilize prices at peacetime levels and thereby to prevent wartime inflation. Section 1 of the Price Control Act (50 U. S. C. App. 901) makes it clear that the Act was designed not only to protect private purchasers from the inflationary price rises consequent upon the wartime swollen demand, but also to protect the several governments in their capacity as purchaser. That section reads in part as follows:

> It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of

this Act are, to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; *to assure that defense appropriations are not dissipated by excessive prices;* * * * *to prevent hardships* * * * *to the Federal, State, and local governments, which would result from abnormal increases in prices;* * * * and to permit voluntary cooperation between the Government and producers, processors, and others to accomplish the aforesaid purposes. [Italics supplied.]

It needs little demonstration that if sellers, like Commodities here, could avoid the effect of maximum price regulations issued under the Price Control Act simply by withholding their products from purchaser governments, and awaiting requisition, the congressional purpose expressed above would be largely defeated. Moreover, the disregard of price ceilings on government acquired goods would make difficult, if not impossible, effective price regulation by Congress in the general wartime economy. The Government cannot hope effectively to stem the tide of war inflation if the products involved in its own procurement program must remain free from price control. During a period of war,

Government-buying dominates the markets,[14] and the legally-established maximum prices would cease to have much meaning if the Government were put in the position of procuring needed property by requisition, rather than by voluntary cooperation, and were required to pay more than the maximum prices. Those fortunately possessed, like Commodities, of a large share of a required commodity would be impelled by their own pecuniary interests to avoid and destroy the ceiling price structure by insisting on condemnation. See Note, *Legal and Economic Aspects of Wartime Price Control,* 51 Yale L. J. 819, 840–841; Marcus, *The Taking and the Destruction of Property Under a Defense and War Program,* 27 Cornell L. Q. 476, 528–530.

There is, consequently, little promise of generally restricting prices to reasonable levels dur-

[14] In World War II, there was "a demand for production of war supplies in proportions previously unimagined. [The] call [was] for production in a volume never before approximated and at an undreamed of speed. The results amply demonstrated the infinite value of that production in winning the war. It proved to be a *sine qua non* condition of the survival of the nation." *Lichter v. United States,* 334 U. S. 742, 763–765; and see pp. 758–765. Approximately half of our national annual output of some two hundred billion dollars worth of goods and service went to the local, State and Federal Governments, with the Federal Government by far the predominant purchaser. Sixth Report of Director of War Mobilization and Reconversion, April 1, 1946, H. Doc. 524, 79th Cong., 2d sess., p. VI; Eighth Report of the Director of War Mobilization and Reconversion, October 1, 1946, H. Doc. 45, 80th Cong., 1st sess., p. 7.

ing time of war if the prices on sales to the Government are not effectively controlled. Cf. *Yakus* v. *United States*, 321 U. S. 414, 432. Nor is it any answer to suggest that the importance of the Federal Government as a buyer affords it ample opportunity to dictate prices by economic compulsion, and that legal sanctions are therefore superfluous. Cf. *United States* v. *Bethlehem Steel Corp.*, 315 U. S. 289; *Lichter* v. *United States*, 334 U. S. 742, 758–765. The exigencies of a mobile and total warfare do not permit time for the play of economic forces, as this very case clearly indicates. See Note, *Legal and Economic Aspects of Wartime Price Control* (1942), 51 Yale L. J. 819, 840–841.[15]

[15] "With the size of Government purchasing reaching astronomical proportions, failure on the part of the Government as a buyer to adhere generally to established price ceilings can nullify the beneficial effects of price fixing. Fortunately, the inflationary tendency of numerous uncoordinated Government purchasers which featured the last war effort has been largely avoided. But even assuming an integrated buying organization, the pressure to spend prodigious sums of money in a hurry and necessity for speedy procurement creates a situation in which some neglect of price ceilings may be inevitable." 51 Yale L. J., at 840–841.

The same commentator also remarks: "Where there is a price ceiling in operation, it is inconsistent with a policy of price control for a seller whose goods have been requisitioned to obtain a price higher than the ceiling." 51 Yale L. J., at 840, fn. 102. Also of the same view is Marcus, *The Taking and Destruction of Property under a Defense and War Program* (1942), 27 Cornell L. Q. 476, 528–530. See, also, Note (1946) 60 Harv. L. Rev. 132, 136–137.

C. THE PRICE CEILING FOR PEPPER, AS IT APPLIED TO COMMODITIES, SATISFIED THE CONSTITUTIONAL STANDARD FOR JUST COMPENSATION

We have urged, thus far, that a validly-established price ceiling normally constitutes the proper maximum measure of just compensation on a taking, and that it should be accepted unless the owner can prove that special circumstances exist, rendering the application of the price ceiling unfair and unjust in his particular case. *Supra*, pp. 30–44. Here, we show that the maximum price for whole black pepper, which must be regarded as generally fair and equitable, was not unfair or inequitable as applied to Commodities.

The burden of proof in all eminent domain cases rests, of course, on the claimant,[16] and in a case such as this, where a valid general price ceiling is alleged to be unfair to the particular owner, the burden is a heavy one, and strong and convincing proof should be offered. That burden Commodities has not borne, and we might, perhaps, rest on that failure. But we wish affirmatively to demonstrate that the pepper price ceiling was fair and equitable to Commodities as well as to other holders of the spice.

1. *The ceiling price for pepper, and the wartime transactions in pepper.*—"Pepper * * * is

[16] *United States* v. *Toronto, Hamilton, and Buffalo Navig. Co.*, this Term, No. 39, decided December 12, 1949, slip op., p. 9; *United States ex rel. T. V. A.* v. *Powelson*, 319 U. S. 266, 273; *United States* v. *Felin & Co.*, 334 U. S. 624, 631.

the most important and widely distributed spice used by the American housewife and by packing industries."[17] It is wholly an import, the natural commodity being grown in the Far East (R. 15). On December 7, 1941, there was a large stockpile of whole black pepper in the hands of importers in the United States (R. 16–17), but it was plain that the course of the war might prevent further importations for a considerable period.[18] Further, "pepper is one of the imported commodities which in the past have often been sharply influenced by speculative price manipulations," and immediately after the outbreak of hostilities in the Far East on December 7th there was a "sharp increase in speculative activity."[19]

(a) These considerations led the Office of Price Administration—then acting under the authority of Executive Order No. 8734—to issue a ceiling price on whole black pepper, on December 11, 1941, of 6.75 cents per pound ex dock or warehouse in New York (R. 15).[20] After the passage of the Emergency Price Control Act, and after further pepper studies, the Office of Price Administration issued, on February 3, 1942, a permanent

[17] From the preamble to the Office of Price Administration's maximum price regulation for pepper (Maximum Price Schedule No. 52), OPA Price Service Food Desk Book, Vol. 2, p. 16701, 7 Fed. Reg. 1308. See fn. 1, *supra*, pp. 4–5.

[18] See fn. 17, *supra*.

[19] See fn. 17, *supra*.

[20] For the formal statement of considerations for issuing this temporary ceiling, see fn. 1, *supra*, pp. 4–5.

price schedule, setting the ceiling price at 6.50 cents per pound, to which were added labor charges for storing the pepper and taking it out, and storage charges for not more than 30 days; on the average, these charges raised the price for pepper to about 6.63 cents a pound (R. 17).[21]

There is no doubt that these basic ceiling prices were founded on the market price as of that time. The Court of Claims found that "the ceiling price of 6.75 a pound for whole black pepper was approximately the fair market price as of December 11, 1941" (R. 16); two of Commodities' expert witnesses agreed that that was so (R. 59, 88).[22] And Commodities concedes that the permanent basic ceiling price of 6.5 cents was also the approximate market price at the time it was established (Br. 7, R. 88). In fact it was sub-

[21] At no time was the ceiling price for pepper challenged in the Emergency Court of Appeals. See *supra*, p. 31.

Maximum Price Schedule No. 52, as it applied at the time of taking (May 1944), is set forth in Appendix C, *infra*, pp. 125, 131.

[22] Commodities' claim that the market price at the time of the imposition of the price ceiling was "unduly" depressed because of the size of the stockpile, disregards the history of pepper prices in previous years, and ignores the speculation which then was taking place in the pepper market, which led the Price Administrator to request the increase of margin requirements and to impose a price ceiling almost immediately after war was declared. And this was still before the enactment of the Price Control Act—at a time when price ceilings were imposed only on selected commodities, the prices of which were already manifesting sharp inflationary tendencies. See *supra*, p. 46; *infra*, p. 98.

stantially higher than the average annual price for this type of pepper during the preceding six years. During most of that time, the price of pepper was well below 6 cents per pound: 5.5 cents (1936), 6.1 cents (1937), 5.4 cents (1938), 4.0 cents (1939), and 4.1 cents (1940). In the first eleven months of 1941, the average daily prices for each month were (in cents per pound): 4.1 (January), 4.5 (February), 6.2 (March), 6.3 (April), 6.9 (May), 5.8 (June), 5.9 (July), 6.1 (August), 6.0 (September), 5.8 (October), 5.8 (November) (R. 15). During the first week of December the average daily price was 5.78 cents per pound (R. 15). On December 11th, the market price had jumped to about 6.75 cents, which was established as the ceiling price (R. 16).

Between December 11, 1941 (when the temporary ceiling was imposed) and February 3, 1942 (the date of issuance of the permanent maximum price regulation), actual trading prices did not reach the 6.75 cents ceiling, the average price in January being 6.41 cents and the highest 6.45 cents (R. 16).

Active trading continued to take place at or below the temporary maximum, and, after its establishment, at or below the permanent ceiling (R. 16–18). By March 1942, when this country was finally cut off from the pepper producing areas (except India) by the Japanese military successes in the Pacific, there were about 78,000,000 to 100,000,000 pounds of whole black

peppers in American importers' hands—about three years' supply (R. 15). Conservation measures were taken by the government agencies interested in preserving food stocks (R. 17–18), but active selling continued—at the ceiling price—until this inventory had been drastically reduced to 28,000,000 pounds as of September 30, 1943 (R. 18, findings 14–15).

Out of this stockpile of 78,000,000 to 100,000,000 pounds available in March 1942, Commodities held approximately 17,000,000 pounds.[23] While others were selling many millions of pounds at the ceiling price, Commodities continued to retain its 17,000,000 pounds, and refused to make any substantial sales (R. 14, 18, 20), so that by September 30, 1943, it owned about 60% of the American stockpile. Between that date and the requisition date (May 26, 1944), very little whole black pepper was sold, and apparently none at all by Commodities (R. 18, 20). Active trading progressively diminished and finally ceased only after importers, other than Commodities (and a few others who likewise refused to sell), had disposed of their holdings, and replenishment of their stock had become impossible because we were cut off from our source of supply in Sumatra (R. 18).

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[23] On December 7, 1941, it held 21,000,000 pounds, but 4,000,000 pounds had been sold for future delivery (apparently at the then prevailing market price, *supra*, pp. 47–48), and these amounts were delivered early in 1942 (R. 14).

It is plain, then, that the cessation in active trading in this commodity by May 26, 1944, when the pepper was requisitioned, came about because (a) holders of pepper other than Commodities (and a few others) had sold their large stocks at the ceiling price, (b) no pepper was being imported into the country, and the usual sources of supply were in Japanese hands,[24] and (c) the remaining supply, already within the country, had become concentrated in the hands of a few persons, principally Commodities, which, as a pepper "investor" or speculator owning more than 60% of the total, insisted on holding its inventory, despite all pleas and efforts to have it make voluntary sales at the ceiling price.[25]

(b) In October 1944, subsequent to the instant taking, the ceiling price for whole black pepper was increased to 10 cents per pound. In March 1946, the price was raised to 16 cents per pound (R. 19). The monopoly position of Commodities,

[24] Black pepper was being produced in British India, but none was being imported into this country because its selling price was far above the lawful maximum price for imports into the United States (R. 21). See *supra*, pp. 10–11; *infra*, pp. 109–110.

[25] Commodities' desire fully to preserve its position is manifest from its vigorous resistance to the requisition from it of pepper for civilian use, in March 1944. *Commodities Trading Corp.* v. *Federal Surplus Commodities Corp.*, Civil Action No. 23573, United States District Court for the District of Columbia, was a suit for an injunction to restrain the taking as unauthorized by the Requisition Act of October 16, 1941 (R. 126–127). This resistance was successful, and pepper was not requisitioned for civilian use.

as one of the few holders of the spice at that time, was the basic force underlying both of these increases. In his Statement of Considerations for the first increase, the Price Administrator stated that persons holding the inventories then on hand had refused to sell at the 6.5 cents per pound ceiling price, and that "the War Food Administrator has reported that he has exhausted every means at his disposal for bringing forth the needed supply, and has advised the Director of Economic Stabilization that the only way in which the necessary civilian supply can be obtained is the granting of a maximum price increase." OPA Price Service, Food Desk Book, Vol. 2, p. 16,731.[28] See also Finding 19, R. 19. Both the increase to 10 cents and that to 16 cents were made after informal agreements had been obtained from Commodities to sell some of its holdings at the new price. About seven million pounds were sold at 10 cents, and the remainder was sold at the 16-cent price (R. 19).

(c) In short, the temporary ceiling price of 6.75 for whole black pepper was admittedly the approximate equal of the market price as of the date it was imposed (December 11, 1941) (R. 16); the permanent basic ceiling price of 6.5

[28] The Administrator also pointed out that "since the advent of the war in December of 1941, the foreign sources of supply for whole black peppers have been closed. The domestic market since that time has had to depend on the inventories then at hand."

cents[27] (established on February 3, 1942) likewise equaled the market price; in addition, it was substantially higher than the average annual price for this type of pepper during the preceding six years (R. 15); and during most of this time, the price of pepper was well below 6 cents per pound (R. 15). Moreover, during the month immediately preceding the fixing of the permanent price, not only was the average daily price below this ceiling, but at no time did the price go above 6.5 cents per pound (R. 16). Active trading continued at or below the ceiling price until the country's stockpile of 78 to 100 million pounds was reduced, in September 1943, to about 28 million pounds (R. 18), of which Commodities held 17 million pounds and like-minded owners appear to have held most of the balance. The maximum price was never challenged in the Emergency Court of Appeals, and it was only raised, in October 1944 and March 1946, as the final resort in the continuing effort to secure needed supplies of pepper for civilian use from Commodities and the others in the little group which held all the available stocks of the spice.[28]

[27] The Price Schedule permitted the addition of labor charges paid the warehouse for putting the pepper in storage and taking it out and warehouse storage charges for not more than 30 days, which, on the average, raised the ceiling price to about 6.63 cents. *Supra*, p. 47.

[28] The general 6.63 cents per pound ceiling is the only one relevant here. Commodities' claims that there were four or five other maximum prices at which it could have sold its

2. *The ceiling price as reflecting fair market value.*—(a) In these circumstances, the ceiling price clearly reflected free market value at the time it was established, and for many months thereafter it constituted the actual market value of whole black pepper in this country.[29] These facts would warrant its use as a measure of just compensation, even under the traditional doctrine that the market value of the property taken is the normal measure of just compensation. *United States* v. *Toronto, Hamilton and Buffalo Navig. Co.*, this Term, No. 39, decided December 12, 1949; *United States* v. *Miller*, 317 U. S. 369, 374. For the "worth of a thing is the price it will bring" (*Standard Oil Co.* v. *Southern Pac. Co.*, 268 U. S. 146, 158), and where the goods are traded on an actual market the prevailing market price has been utilized as the determinant of just compensation, without reference to the owner's individual circumstances, such as his costs or profit. *United States* v. *New River Collieries Co.*, 262

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pepper in May 1944, if it had desired to do so (Br. 12, 41): (1) the export ceiling price; (2) the single-bag ceiling; (3) the price for synthetic or imitation pepper; and (4) the price for ground black pepper. In Point II, we show why these other ceilings—which Commodities artificially has injected into the case—cannot properly be used in determining just compensation here. *Infra*, pp. 110–115.

[29] It is nowhere suggested that the ceiling price was set with a view to establishing the price for government requisitioning, rather than to the needs of private trading. Cf. *United States* v. *Felin & Co.*, 334 U. S. 624, 646; R. 29.

U. S. 341; *L. Vogelstein & Co.* v. *United States*, 262 U. S. 337.[30]

The *Vogelstein* case—which some members of the Court have recently indicated as "closely approach[ing] the situation" presented when a market exists at the ceiling price (*United States* v. *Felin & Co.*, 334 U. S. 624, 645)—shows that a market value based on a controlled price can properly be used. In that case, the measure of just compensation approved for some 12,500,000 pounds of copper requisitioned from the company was the price fixed in an agreement which had been made between the War Industries Board and representatives of the copper producers and copper interests (including Vogelstein), and approved by the President. During the period in which this copper was taken, about 283,000,000 pounds were furnished to the United States at the fixed price, and the Vogelstein Company itself sold some 25,000,000 pounds to the Government at that sum. The fixed price was therefore held to constitute the market price, and the correct measure of the award.

[30] "Where there have been recent actual sales of substantially similar property, market value can be ascertained from an observation of those sales. It is unnecessary to go behind the scenes and inquire what influenced the buyers in paying the prices that they did." Hale, *Valuation in Condemnation Cases* (1931), 31 Col. L. Rev. 1, 2; Marcus, *The Taking and Destruction of Property under a Defense and War Program* (1942), 27 Cornell L. Q. 476, 529.

The significance of *Vogelstein* is that the actual trading in copper furnished the test proving that the controlled price was fair and reasonable, even though the particular company could show that its own costs exceeded that price (262 U. S. at 340). Similarly, here we have a ceiling price which was equivalent, at its inception, to the free market price, and thereafter it formed the basis for a very substantial body of trading for a considerable period. As in the World War I case, the ceiling price should be accepted, even though Commodities may show such "special circumstances" as that its costs are higher, or that it would have retained the pepper for higher prices. Vogelstein's costs were disregarded, as was its ability to keep its copper—as nonperishable as pepper—for many years. (On the owner's ability to keep his goods until after the war as entering into just compensation determinations, see also *infra*, pp. 67–88).[31]

[31] There are, of course, situations where it is said that just compensation is measured by market value, but where there is no actual market. Perhaps the commonest example of that situation is the requisition of real estate, where, all too frequently, there is no actual market value, but in subservience to the market value criterion, one is postulated by attempting to ascertain "the amount that in all probability would have been arrived at by fair negotiations between an owner willing to sell and a purchaser desiring to buy." *Olson* v. *United States*, 292 U. S. 246, 257; *Brooks-Scanlon Corp.* v. *United States*, 265 U. S. 106, 124. In this situation, just compensation is, in reality, often set on an individual

(b) It is true that by the time this pepper was requisitioned in May 1944, trading had ceased, and there was no active market at the time of taking. But the Court of Claims' findings show indisputably that the cessation of trading occurred because, by September 1943, most other holders of pepper had disposed of their stocks at the ceiling, and the remaining supply of the fixed amount of the commodity in the United States was held by relatively few persons—all of whom resolutely refused to make any sales, and at the same time would not attack the price ceiling in the Emergency Court, although it was open to them to show that the maximum was no longer a valid one (*supra,* p. 31). Commodities itself held some 60% of the total American inventory. See *supra,* p. 49.

On these facts, the ending of trading may properly be disregarded, and resort had to the earlier period when substantial buying and selling did occur. The only market value to be considered in eminent domain proceedings is the "*fair* market value" based on "*fair* market conditions" (*New York* v. *Sage,* 239 U. S. 57, 61; *United States* v. *Miller,* 317 U. S. 369, 374–375; *United States* v. *Cors,* 337 U. S. 325, 332) (italics supplied), and it does not lie in the mouth of

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basis, and it may be that in such circumstances a ceiling price or a maximum rent fixed on general, rather than individual, standards might not, in itself, afford just compensation. Cf. *Bowles* v. *Willingham,* 321 U. S. 503, 517.

an owner holding 60% of the total supply, whose refusal to trade destroyed the market, to insist that the courts blind themselves to the active market constituted by owners willing to sell and purchasers willing to buy. Just as "strict adherence to the criterion of market value may involve inclusion of elements which, though they affect such value, must in fairness be eliminated in a condemnation case" (*United States* v. *Miller, supra,* at 375), so the death of the market brought about in this way must "in fairness" be disregarded in a condemnation case.

3. *The administrative determination of the fairness of the ceiling price as applied to Commodities.*—In addition to the proof afforded by the large-scale trading in pepper at the ceiling price, there was, in March 1944, an express administrative determination that the established maximum was not only fair and equitable in general, but also fair and equitable to Commodities. On October 4, 1943, the first formal challenge against the pepper price ceiling was filed, and it was by Commodities (R. 35–37). In its request for an amendment to the regulation, it did not question the fairness of the 6.5 cent basic price; instead, it merely requested the addition of a provision allowing persons who sold pepper ex warehouse to add storage charges computed at the rate of $\frac{1}{24}$ cent per pound per month "for the average number of months beyond one month during which the pepper held by the seller at the date

of this amendment shall have been owned and stored by him." (R. 19–20, 36).[32]

(a) The Price Administrator denied Commodities' request because he found that, even without that additional provision, the ceiling price allowed Commodities a profit substantially in excess of the normal profit in the trade (R. 36–37). He also specifically determined that the general price ceiling should in all fairness be applied to Commodities (R. 37). In the letter rejecting the application, it was pointed out that evaluation of Commodities' inventory on a "first in, first out"[33] basis showed that its average cost on February 3, 1942, when Revised Maximum Price Schedule No. 52 went into effect, was 5.5156 cent per pound, and sales of its inventory at that time, at the ceiling price of 6.50 cents plus permissible charges, or 6.63 cents, would have afforded it a gross margin of profit of 20.35 per cent (R. 37). In addition, the Price Administrator pointed out that had the inventory been sold on October 4, 1943, the date of the petition for an amendment, the additional carrying charge of .6232 cents per pound would have reduced Commodities' gross margin of profit by 8.13 per cent to 12.23 per cent. Net profit for ceiling sales on February 3, 1942, would have been almost 17%, and on October 4, 1943, it would have

[32] The price schedule permitted the addition of storage for not more than 30 days. See *supra*, p. 47.

[33] The Price Administrator's evaluation assumed that Commodities' inventory consisted solely of its most recent purchases. For a description of this method, see R. 110–111.

been 7.5%. Since "the trade reports that a reasonable profit is 10 per cent, the ceiling price established on February 3, 1942, appears as fair and equitable to you" (R. 37). The letter further noted (R. 37):

> Of course, you held your pepper following the original issuance of the regulation fully recognizing the fact that the regulation did not provide for further carrying charges. Grinders have been ready to purchase since the issuance of the regulation. Under all these circumstances it has been determined that it would be unfair to give you the increase in maximum prices which you request.[34]

(b) In this suit, Commodities seems to insist that the ceiling price was neither generally fair and equitable nor fair and equitable to it, despite both the failure to seek court review and the Price Administrator's specific finding. (See, especially, Commodities Br., pp. 10, 21–23). It presents some seven reasons why the 5.63 ceiling was unfair, but six of these are complaints which any pepperholder could have made, and which, if they have any bearing at all, go to the general fairness of the price ceiling, *i. e.* the Indian market (Commodities Br., pp. 11, 46–48); the ceiling price

[34] The denial of this petition for amendment was apparently not reviewable by the Emergency Court of Appeals (O. P. A. Revised Procedural Regulation No. 1, sec. 1300.20, 7 Fed. Reg. 8962), though, as stated above (*supra*, p. 31), Commodities could attack the price ceiling itself as no longer valid.

for imitation black pepper (Br., pp. 9–10, 42, 57–58); the cyclical theory of pepper prices (Br., pp. 48–53); post-war replacement cost (Br., pp. 6, 35–40, 53–57); the price obtainable after control (Pet. 3; Br., pp. 35–40, 53–57); and the post-war price as anticipated in May 1944 (Br., pp. 5–6, 35–40, 53–57). Since neither Commodities nor any other holder of the spice saw fit to go to the Emergency Court, Commodities is not free to say that the price regulation was not generally fair and equitable, and its objections on that score should not be considered. *Supra,* pp. 31–36. And the general trading in 1942 and 1943 furnishes additional validation of the fairness and reasonableness of the ceiling price, without further detailed proof, as we have just urged (*supra,* pp. 45–57). However, in Point II we discuss most of these specific contentions on their merits, and show (a) that they do not justify Commodities' claim that it is entitled to more than the 15 cents per pound awarded by the lower court, and also (b) that they do not impeach our claim that the ceiling price is a sufficient measure of compensation. *Infra,* pp. 92–116. Moreover, three or four of these seven arguments are merely varying formulations of the conception of "retention value" which we shall urge has no place in a requisition for war purposes. *Infra,* pp. 67–88.[35]

[35] The fact that the ceiling price was raised to 10 cents later in 1944, and then to 16 cents, in order to induce Commodities to part with its stocks, does not indicate, of course, that the

(c) The one complaint which does possibly bear on the particular application of the maximum price to Commodities—in its relation to the present taking—is the charge that the cost of the requisitioned pepper was higher than as found by the Administrator (*supra*, p. 58), or even as determined by the Court of Claims (R. 21–22). Above, we have argued that because of the active and substantial market in pepper, as well as the conditions under which the ceiling price was established, Commodities' own costs are immaterial. *Supra*, pp. 53–57. In any event, Commodities' argument as to its costs is erroneous, because its claim of higher costs largely stems from the facts that it itself chose the high-cost pepper (rather than the lower-cost pepper in its stock) to give to the Government on requisition, and it elected to retain its high-cost supplies as long as it could. Commodities had purchased pepper from 1933 until the onset of the war and its purchases had been at prices ranging from a high of eleven cents a pound in 1934 to a low of 3.8 cents a pound in 1939 (R. 66–68). At the time of the requisition, Commodities had on hand, and separately identifiable, both high-cost and low-cost pepper. In complying with the War Department's requisition, the determination as to what

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6.63 ceiling was not generally fair and equitable, or fair and equitable to Commodities, in May 1944, when the instant requisition was made. For the circumstances in which the ceiling price was later raised, see *supra*, pp. 9–10, 50–51; *infra*, pp. 106–108.

pepper to deliver to the Government was made by Commodities itself, and it delivered the high-cost pepper bought between 1933 and 1936 (R. 94, 21); see *supra,* p. 11. As a result, the court below, by adopting Commodities' figures in regard to the actual bags of pepper requisitioned, greatly inflated the costs in its favor.

Moreover, not only was the pepper delivered high-cost pepper but it had been held in storage by Commodities the longest of all peppers owned by it, awaiting the time when the spice could be disposed of profitably. As a result, the various additional costs—such as storage, insurance, taxes, interest and general administration-expenses—which the Court of Claims included in computing the cost, were all disproportionately high, in comparison with the similar costs incurred in connection with the more recently purchased pepper.

If, instead of using these extremely favorable (to Commodities) figures, the court below had used average costs, as it would have been reasonable to do since pepper is fungible, or, even more realistically, had computed costs on the "first in, first out" basis used by the Price Administrator in his evaluation of the fairness of the price ceiling as applied to Commodities, the computed costs would have been substantially lower. See *supra,* p. 58.[36] The Court of Claims,

[36] As indicated above, Commodities began purchasing pepper in 1933, and was apparently buying and selling dur-

by using the figures of the cost of the particular bags requisitioned, in effect required the Government to reimburse Commodities for its long past errors in judgment in buying relatively high-cost pepper in 1933, 1934, and 1935 (see *infra*, p. 97). It is impossible to see how Commodities can validly claim that the "cost of the pepper" justified an allowance of more than 20 cents a pound (*infra*, pp. 99–102), or that, because of its costs, the ceiling price was unfair as applied to the present taking.[37]

4. *Commodities' near-monopoly of pepper.*— Finally, it should not be forgotten, in testing the fairness of the application of the price ceiling in this case, that Commodities made itself a near-monopolist of pepper by refusing to sell any of its supply while others were disposing of theirs. At the outset of the war, we were cut off from our foreign sources for pepper and by the time of this requisition not only was pepper extremely scarce but it was concentrated in r latively few holdings, with Commodities having 60% of the told stockpile. *Supra*, pp. 48–50. Had the market

ing the period from 1933 to 1942. Its highest inventory was in the neighborhood of 25,000,000 pounds in 1938; on December 7, 1941, it held about 21,000,000 pounds, 4,000,000 pounds of which had been sold for future delivery and was delivered in the early months of 1942 (R. 14). Since Commodities seems to claim that the average cost of all pepper held by it in May 1944 was high (Br. 16), it is apparent that it must have selected the lower-cost pepper to use in its voluntary sales prior to 1944. See R. 110–111 and Tr. 287–290 (transcript of testimony in Court of Claims).

[37] On Commodities' cost argument, see also *infra*, pp. 99–102.

not been controlled, Commodities, by virtue of its near-monopoly of the domestic pepper supply, would have been in a position to dictate the terms and conditions under which it would sell its pepper. Because of this near-monopoly power in Commodities—a power to exploit for its own interests the calamity which had befallen the nation—the case closely parallels the situation discussed in the colloquy from the hearings held before the first Advisory Board on Just Compensation (for merchant vessels) set out in the dissenting opinion in *United States* v. *Cors*, 337 U. S. 325, 341, fn. 3.[38]

[38] "Judge HAND. It comes to this, that a society which foresees a shortage, a consequent shortage in one kind of supply, must either proceed at once to seize, or must subject itself and society at large to the disadvantage which comes from the shortage. But when the shortage comes, it may not say 'So far, and no further. We leave the property in your hands for use, but we are helpless to prevent your further exploitation of society by your special interest.'

"Is that your position?

"Mr. MCINNIS. I think, your Honor, that that is the logical implication of my argument.

"Judge HAND. It does seem to me, if it is all perfectly clearly known in advance, to put a society in a rather helpless position as against a small group that has control of all of one vital commodity. You can imagine cases where that would work a result that no one would support. You can imagine the destruction of a large part of food in a community where there was no immediate relief, and, as I understand your argument, they either have to take it now, or when they would find it more convenient to take it they should have to submit to the increase in value, however clearly the owners were advised at a given point, 'This marks the end of that kind of profit—scarcity profit.'

Judge Hand's hypothetical emerges into reality:—When the world war came to the Far East, and the Japanese began their rapid advances in December 1941, it was foreseen that this country would be barred from importing much more pepper, and would probably have to rely on its existing stocks for the duration of the war; by February 1942, this forecast was even more plainly outlined. To prevent exploitation of the community by those fortunately possessed of the newly-scarce commodity, price ceilings were imposed—price ceilings which were based on the free market price and which were generally fair and equitable—and the owners of pepper were thus advised that they would not be able to reap any increase in value stemming from the scarcity. What Commodities asks is that the price-ceiling barrier to such an increment in value be disregarded, and that it be allowed to secure all or part of the increase flowing from its special position.

But, as Judge Hand appeared to suggest, and as Judge Hutcheson, after further discussion with counsel, stated more explicitly,[39] a value-increase

"Mr. McInnis. I think that is correct, Judge. But I would agree——

"Judge Hand (interposing). It might be that the Constitution protects that kind of profit. I won't say now." (1 Report of Proceedings of the Advisory Board, 134–135 (United States Maritime Commission, War Shipping Administration, mimeographed, 1943).)

[39] "Judge Hutcheson. The way to determine Judge Hand's suppositious case is by saying that if a calamity had

coming about through the interaction of the community's emergency and the owner's monopoly would be a "calamity value and not a just value," a "hold-up value" which would be unprotected by the Constitution, and not a fair market value. It is, indeed, difficult to believe that there is anything in the Fifth Amendment requiring the inclusion of such "hold-up value" as an element of just compensation. Cf. *United States* v. *Cors*, 337 U. S. 325, 333–334; *Lord Mfg. Co.* v. *United States*, 84 F. Supp. 748, 755–756 (C. Cls.).[40]

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brought about a tremendous scarcity, the value then fixed would not be the just and fair value of that piece of property, because it would be a calamity value and not a just value. It doesn't mean that the citizen will get what is unjust, or that the Government will pay what is unjust.

"I thought he said: Here is a situation where some calamity destroyed nearly everything you have got in a community, and the prices which somebody might put in the face of that calamity would be regarded as the market price.

"Mr. McInnis. I didn't intend to agree to that. I didn't understand his illustration to be that way, but if that were intended, then I do not agree to that extent. I think that is what I would call a hold-up value, and not based on the general market value.

"Judge Hand. That is." (1 Report of Proceedings of the Advisory Board, pp. 136–137 (United States Maritime Commission, War Shipping Administration, mimeographed ed., 1943).)

[40] The *Lord* case likewise involved a just compensation claimant who was a near-monopolist, and whose products were necessary for the war effort. His demand for his pre-war commercial prices (which he contended represented his product's market value) was rejected in favor of the Army and Navy's administrative award which allowed him cost plus 10%. For pertinent quotations from the Court of

D. POSTWAR "RETENTION VALUE" SHOULD BE EXCLUDED FROM CONSIDERATION IN JUST COMPENSATION DETERMINATIONS FOR WAR TAKINGS

As we read the Court of Claims' opinion (R. 23–28), it did not refuse to consider the maximum price as controlling because it was a legally-imposed ceiling, or because a "free" market did not exist in wartime. (*Supra*, pp. 36–41). Rather, the court below based its rejection of the ceiling price solely on the fact that the property involved here was non-perishable and could be retained by the owner until after wartime controls were removed. It insisted that there are many instances where the owner can keep his property until the lifting of controls, and he is constitutionally entitled to have the award take into consideration "his right to hold his property until he can get for it whatever anyone is willing to pay" (R. 25), *i. e.*, "the price it undoubtedly could have secured for its pepper had it been permitted to hold it until after restrictions had been removed" (R. 27).[41] But this so-called "retention value" is subject to so many grave

Claims' recent opinion (handed down July 11, 1949) see fn. 53, *infra*, pp. 83–84.

[41] As bearing on the view of the Court of Claims that so-called "retention value" is the reason why price-ceilings are improper measures of just compensation, see *Fabrica Uruguaya de Neumaticos, S. A.* v. *United States*, C. Cls. No. 46486, decided July 11, 1949, 84 F. Supp. 745, 747; cf. *Illinois Pure Aluminum Co.* v. *United States*, 107 C. Cls. 1, 19–20, certiorari denied, 330 U. S. 843.

objections, both practical and ethical, that it should be rejected in just compensation determinations for war requisitions, where a valid price ceiling has been established.[42]

1. *"Retention value" is too speculative.*—In the first place, just compensation is to be determined at the time of taking, and not at some later date (*Seaboard Air Line Ry.* v. *United States,* 261 U. S. 299, 306; *L. Vogelstein & Co.* v. *United States,* 262 U. S. 337; *United States* v. *New River Collieries Co.,* 262 U. S. 341; *Olson* v. *United States,* 292 U. S. 246), and a wartime evaluation of post-war conditions and post-war prices—as they will affect a given commodity or property—necessarily rests on a peculiarly tenuous type of speculation which is unacceptable as a basis for decision. The duration of the war is unknown; even the matter of ultimate victory or defeat is still at hazard. No one can foretell, with any pretense at approximate accuracy, how long price ceilings or other controls will be retained; the owner may find it desirable or necessary to sell his goods before ceilings are lifted;[43] and the course of prices and the nature of general economic conditions, once the market is "free" again, lies in the domain of inspired prophecy rather than of fact-

[42] None of the previous Court of Claims cases cited by the court below at R. 25 involved a maximum price.

[43] For instance, in this case, many holders of smaller lots of pepper sold at the ceiling price rather than hold the pepper indefinitely and incur the cost of holding (R. 16). See *infra,* p. 76.

oriented judgment.[44] General experience with economic forecasting, especially in a period of great flux, does not justify an attempt by courts, required to make evaluations as of the midst of a war, to foretell market or business conditions several years in the future, or in relying on others who claim that gift. Cf. *New York* v. *Sage*, 239 U. S. 57, 61.[45]

2. *"Retention value" is normally rejected in eminent domain.*—Secondly, the owner's right to hold his property until better prices can be had does not ordinarily prevent an eminent domain determination from being made on the basis of prices current at the time of taking. If this pepper, for instance, had been seized on December 10, 1941, no one would doubt that an award of

[44] In its recent *Neumaticos* opinion (fn. 41, *supra*), the court below recognizes that "retention value" is "an intangible value, incapable of anything like exact measurement. * * * It influences value, but affords but a poor guide by which to measure it." 84 F. Supp. at 747.

[45] In the case at bar, a judgment (as of May 1944) as to the price Commodities could get "after restrictions had been removed" would depend—in addition to the general factors mentioned above—on knowledge of what had happened to the pepper vines in the Far East under the Japanese occupation, and there was no near-accurate means of knowing this in 1944. According to the Japanese propaganda, the natives were continuing their plantings of new vines (R. 102). If true, these plantings, plus the stockpile which would have accumulated during the war, would have led to a depressed rather than an inflated post-war price. See *infra*, pp. 96–97. In addition, this pepper was taken on May 26, 1944, before the invasion of France or the battle of the Bulge, and, of course, long before the events over Hiroshima and Nagasaki.

6.75 cents per pound (the then "fair market price") would be proper (R. 16), even though Commodities strongly desired and intended to retain its pepper to reap the anticipated higher prices of the future. "Retention value" would then have been wholly disregarded. Similarly, one whose property is taken in a period of depression does not get increased compensation (under the majority rule) because he would have refused to make a voluntary sale at that time, and would have waited for higher prices. *Alishausky* v. *MacDonald*, 117 Conn. 138, 141–142; Orgel, *Valuation Under the Law of Eminent Domain* (1936), sec. 23.[46]

The reason for this generally accepted rule is not that the owner could replace the requisitioned property at the current market price, and thus keep his previous position unchanged. Frequently that assumption is simply not true, as, for example, if the Government had seized a very large portion of Commodities' pepper early in December 1941, or as in *Vogelstein & Co.* v. *United*

[46] In *United States* v. *Delano Park Homes, Inc.*, 146 F. 2d 473, 474 (*supra*, pp. 37–38), the Second Circuit said that it would be unjust to allow an owner, who could hold his property until the market recovers, the prices current when "the market is upset by temporary variations of supply or demand"; but it seems clear that the court was referring, not to a relatively prolonged depression, but to a "temporary depression and stringency of the money market" of short duration, such as existed in *United States* v. *Inlots*, Fed. Cas. No. 15,441a (C. C. S. D. Ohio), 26 Fed. Cas., at pp. 490, 494–495, affirmed *sub nom. Kohl* v. *United States*, 91 U. S. 367.

States, 262 U. S. 337, where the owner of the requisitioned copper clearly could not replace it at the price held by the Court to be just compensation.[47] The true reason seems to us to be that the existence of actual dealings between willing buyers and sellers, leading to a real market value, validates that current price as generally fair, just, and reasonable—regardless of the particular owner's desires or intentions—and therefore sanctions its use as a measure of just compensation. Where lawful wartime price ceilings have been imposed, we have another method of validating the current price as generally fair and equitable (*supra,* pp. 30–34), and, in accordance with the rule in the more familiar instances cited above, asserted "retention value" should be disregarded. See also *supra,* pp. 53–59.

3. *Inclusion of "retention value" is unfair to the public and other traders.*—Above all, "retention value", even if it could be adequately measured, should be rejected because in wartime it is not fair or just to the public and to other traders to take it into account, and it is far from unfair or unjust to the owner to exclude it from consideration. For this reason, even if it be

[47] The opinion of Mr. Justice Frankfurter in *United States v. Felin & Co.*, 334 U. S. 624 indicates that if the Government had requisitioned the meat products in that case from Felin's customers "there would have been no question that the ceiling prices would have been the measure of just compensation," (334 U. S., at p. 631, n. 4)—but it seems quite unlikely that these customers would have been able to replace the requisitioned goods at the ceiling price.

viewed as a real element of "value", it is one for which no compensation should be made. Cf. *Block* v. *Hirsh*, 256 U. S. 135, 156–8.

(a). The excess over the ceiling price added by such "retention value" would normally be the anticipated increment due to a war-caused post-war inflationary rise. Disruption of production, severe shortages, unfulfilled demands, market dislocations, and scarcities of all types, dam up cumulatively during the war, and break out after the removal or slackening of controls in market surges of which the owner anticipates taking full advantage. But it is not fair to the Government to require it to compensate an owner for such an increment of value directly attributable to the special conditions of production and distribution which necessarily accompany a great war, any more than it is fair that the Government be required to pay, where the wartime market is uncontrolled, the enhanced price which its demand alone has created. *United States* v. *Cors*, 337 U. S. 325, 333.

Just as an uncontrolled wartime market may be "an unfair indication of value" because, among other things, it reflects the Government's special need for an article or commodity,[48] so we think that a potential post-war

[48] Compare the remarks of Bernard M. Baruch, in his 1921 Report as Chairman of the War Industries Board (*American Industry in the War*, 1941 ed. p. 79) :—"In the war, market value was largely created by the Government's emergency, and hence it was not a fair test of just compensation"; and see the opinion of Mack, C. J., in *The Cushing*, 285 Fed. 617.

market, higher than the ceiling price because of the stresses and shortages due to the war, should be excluded from consideration. The increased value flows from the common emergency, the common disaster, and the common effort, and, in the case of a taking for war purposes, the Government should not be forced to allow the owner to take an individual benefit from this war-created value, at the general expense. Cf. *Block* v. *Hirsh*, 256 U. S. 135, 157; *Kimball Laundry Co.* v. *United States*, 338 U. S. 1, 5. Private persons might be willing to pay these higher prices in the post war years, but a dominant purpose of the requisitioning power is to enable the Government to obtain needed goods, at reasonable prices uninfluenced by unfair elements of value, from a recalcitrant owner who would prefer to wait and obtain the expected higher amounts from others. Cf. I Bonbright, *The Valuation of Property* (1937) 408; see *United States* v. *Bethlehem Steel Corp.*, 315 U. S. 289, 309; *Lichter* v. *United States*, 334 U. S. 742, 754, 756.

It is a portion of this war-caused value-increase which Commodities demands, and which the Court of Claims gave to it in lesser sum. The war brought about the scarcity of pepper in

618–619 (S. D. N. Y.), reversed, 292 Fed. 560 (C. A. 2), affirmed *sub nom. Standard Oil Co.* v. *Southern Pacific Co.*, 268 U. S. 146, on the nature and fairness of the World War I uncontrolled ship market, stressing the necessity of testing the market price against the ultimate criterion of fairness under the circumstances.

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the United States, the concentration of holdings in the hands of Commodities and its fellows, the destruction of the pepper vines in the Far East, and the sharp reduction in the production of the spice during and after the war years. And it is precisely these factors which have caused the rise in the price of pepper and which Commodities insists made it reasonably expectable in May 1944 that the price would soar once controls were removed. (See Commodities Br., pp. 11, 53–57, 60–62.)

Significantly, Commodities refuses to acknowledge the nature of the "retention value" it demands, and disguises its claim as a right to wait for a "fair" or "normal" price (Br., pp. 23, 53). But, as we have shown, the maximum price must be accepted as a fair and equitable one in May 1944 (*supra*, pp. 30–34, 45–57), and particularly with this commodity, it is impossible to eliminate the enormous impact of the war and to hypothesize a "normal", non-war-connected, price. The war had its drastic effect, and there was, and could be, no return to pre-war "normal conditions". The real basis for the claim to "retention value" is that there is a constitutional right—which we deny—to get more than the currently fair and equitable price in wartime because the commodity can be held until prices go higher. And even more significant than the terms in which the claim is clothed is the fact that Commodities does not demand, and the lower court did not grant, the

full war-caused increment, even though their reasons for making a partial award would inevitably compel allowance of the entire amount. This abstinence shows, we think, the uneasiness infecting a claim that an owner is constitutionally free in wartime to take advantage of post-war war-caused price rises, and strongly suggests that such a claim is not within the common understanding of what is fair and just.

Even if the owner could demonstrate conclusively that the anticipated post-ceiling increment is non-war-caused in the sense that it flows from the normal workings of the economic system which *actually* continued to operate during the war period—rather than from the intervention of war conditions—fairness would not require the increment to be allowed over and above a ceiling price which concededly is fair and equitable in general, and is also probably fair and equitable to the particular claimant. As we show below (*infra*, pp. 77–78; see also *supra*, pp. 36–41), the loss of that additional element of "value" is closely akin to the many uncompensated depreciations or reductions in property values which accompany a war (*Bowles* v. *Willingham*, 321 U. S. 503, 517–519), and in our view, justice does not require singling out the owner of requisitioned property for reimbursement of this type of tangential value-increment.[49]

[49] Commodities attempts to place the increment it claims within this class of non-war-connected increases in value, but

(b). Furthermore, giving effect to "retention value"—assuming that the claimant can prove it exists—constitutes an unfair discrimination against those traders or property owners who do not have, or cannot show that they have, the resources to enable them to out-wait the war and its system of controls. Unlike Commodities, few traders are in the financial position to incur the costs of freezing their inventory for the indefinite period of a war, on the gamble that at the end of that period they would be able to dispose of it profitably. See *Supra,* p. 68, also fn. 43, p. 68. Indeed, it was apparently because of this pressure that many traders in pepper sold their stock at the ceiling price, for, as the court below found, "* * * traders in pepper, importers, and grinders, particularly those who held smaller lots [sold their pepper] because they realized it would be impossible for them to obtain a greater price than the ceiling, and therefore they sold rather than hold the pepper indefinitely and incur the cost of holding" (R. 16).

To take account of potential post-war markets, in requisition proceedings, is thus to compensate

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we show below that the alleged increment does not fall in this category (*infra*, pp. 93–99), and the Court of Claims apparently did not so regard it. Commodities' argument is really based on a hypothetical construction of what would have happened to pepper and pepper prices, *if there had been no war*, rather than on proof that the alleged normal workings of pepper-growing and the pepper trade actually continued to operate while the war was going on. This, of course, is not a true test of "retention value" at all.

the well-placed owner primarily for being able to withstand the pressures of the wartime economy. His weaker brother, who would have submitted to the economic compulsion to sell at the ceiling, cannot, of course, prove that he would have kept the goods, and therefore cannot claim compensation for "retention value," any more than the owner of a perishable commodity could do. Cf. *United States v. Felin & Co.*, 334 U. S. 624, 645–646; R. 24–25 (opinion of Court of Claims).[50] But the ability of the strong to withstand the pressures of the wartime economy does not seem a fairly compensable item or element of value.

4. *Exclusion of "retention value" is not unfair to the owner.*—Certainly, in the conditions of wartime life, the owner cannot rightly charge unfairness against the exclusion of "retention value." The deprivation he suffers, if there be any at all, is wholly comparable to, and no greater than, the non-compensable losses endured by many seg-

[50] We urge above that—disregarding the matter of "retention value,"—there is no objection to using the ceiling price as the measure of just compensation. *Supra*, pp. 34–41. In the *Felin* case, *supra*, four justices appear to have agreed, in a case involving what was regarded as a perishable commodity without "retention value," that the ceiling price is the proper measure (334 U. S. at 642–649); three justices did not reach that issue (334 U. S., at 625–642); and two justices thought the ceiling price should not be the measure. 334 U. S. at 650–653. (The products requisitioned in *Felin* were largely cured pork products; they were in fact probably not perishable and could have been kept, under proper refrigeration, for a substantial period of time.)

ments of the nation, as a result of the total mobilization of effort, manpower, and of property required to win the war. Cf. *Lichter* v. *United States,* 334 U. S. 742, 755–765, 767.

(a). Allocations and priorities systems were devised to distribute scarce materials and products of all kinds among competing military and civilian demands and to insure the prompt, efficient, and adequate flow of short materials to the armed forces, to our allies, and to the home front. In order to attain these objectives, it was often imperative to withdraw or revise allocations granted, or to reallocate because of a changed military situation or a change in legitimate consumer demands. See Brief for Respondents in *Steuart & Bro.* v. *Bowles,* No. 793, Oct. Term, 1943, pp. 18–21. As a result, many business enterprises were deprived of the materials they needed for the conduct of their operations, with the result that many had to curtail and even cease operations. Notwithstanding these consequences, these systems were undoubtedly constitutional (cf. *Steuart & Bro.* v. *Bowles,* 322 U. S. 398), and although the losses suffered frequently were very substantial, such damages were only incidental to the overall objective of so organizing our economy as to enable the United States to wage war successfully. *St. Regis Paper Co.* v. *United States,* 110 C. Cls. 271, certiorari denied, 335 U. S. 815.[51]

[51] Any financial losses which ensued were "damnum absque injuria * * * private interest has merely come into colli-

As pointed out in *Steuart & Bro.* v. *Bowles*, *supra* at 405:

> That power of allocation or rationing might indeed be the only way of getting the right equipment to our armed forces in time. From the point of view of the factory owner from whom the materials were diverted the action might be harsh. He would be deprived of an expected profit. But in times of war the national interest cannot wait on individual claims to preference. The waging of war and the control of its attendant economic problems are urgent business.

In addition, the Government simultaneously was endeavoring to prevent inflation by means of price ceilings imposed on every commodity bought and sold within the national boundaries (*Yakus* v. *United States*, 321 U. S. 414), as well as the amount of rent to be charged for every room, home, or building (*Bowles* v. *Willingham*, 321 U. S. 503). The fact that the imposition of these price ceilings reduced the value of the property regulated was expressly rejected by the Court as an obstacle to the Act's constitutionality (*Bowles* v. *Willingham*, 321 U. S. at 517–518). The Court further noted (p. 519):

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sion with a public interest, and has had to yield." *Brown* v. *Wilemon*, 139 F. 2d 730, 732 (C. A. 5), certiorari denied, 322 U. S. 748; see, also, *Gallagher's Steak House* v. *Bowles*, 142 F. 2d 530 (C. A. 2), certiorari denied, 322 U. S. 764; *Shreveport Engraving Co.* v. *United States*, 143 F. 2d 222 (C. A. 5), certiorari denied, 323 U. S. 749.

> A nation which can demand the lives of its men and women in the waging of that war is under no constitutional necessity of providing a system of price control on the domestic front which will assure each landlord a "fair return" on his property.

Various controls and restrictions were likewise placed on the upward movement of wages; there were limitations on the right to strike, and on the freedom of collective bargaining; manpower regulations were instituted. See *A Symposium On Labor Law in War Time* (1944) 29 Ia. Law Rev. 145 *et seq.*

Also, Congress by the Renegotiation Acts and the Royalty Adjustment Act was attempting to limit war profits. See Sec. 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, 56 Stat. 226, 245, as amended, 50 U. S. C. App. 1191 (Renegotiation Act); Act of October 31, 1942, 56 Stat. 1013, 35 U. S. C. (1940 ed.) Supp. V, 89–96 (Royalty Adjustment Act). The power to control these profits had been explicitly affirmed in *United States* v. *Bethlehem Steel Corp.*, 315 U. S. 289, 309. And the Renegotiation Acts were sustained in *Lichter* v. *United States*, 334 U. S. 742, with the statement (334 U. S. at 756):

> The conscription of manpower is a more vital interference with the life, liberty and property of the individual than is the conscription of his property or his profits or any substitute for such conscription of

> them. For his hazardous, full-time service in the armed forces a soldier is paid whatever the Government deems to be a fair but modest compensation. Comparatively speaking, the manufacturer of war goods undergoes no such hazard to his personal safety as does a front-line soldier and yet the Renegotiation Act gives him far better assurance of a reasonable return for his wartime services than the Selective Service Act and all its related legislation give to the men in the armed forces. The constitutionality of the conscription of manpower for military service is beyond question. The constitutional power of Congress to support the armed forces with equipment and supplies is no less clear and sweeping. It is valid, *a fortiori*.

See, also, *United States* v. *Bethlehem Steel Corp., supra,* at 305 (under the war power, "Congress can draft men for battle service * * *. Its power to draft business organizations to support the fighting men who risk their lives can be no less"); cf. *Coffman* v. *Federal Laboratories,* 171 F. 2d 94 (C. A. 3), certiorari denied, 336 U. S. 913.

At the same time, the Government was conscripting, without reference to compensation, millions of citizens for service in the armed services, divorcing them from their normal pursuits, separating them from their families, and exposing them to the hardship and hazards of combat, including possible injury and loss of life. *Falbo* v.

United States, 320 U. S. 549; *Selective Draft Law Cases*, 245 U. S. 366; cf. *Commers* v. *United States*, 159 F. 2d 248 (C. A. 9), certiorari denied, 331 U. S. 807.[52]

Each of these systems of regulation or control frequently imposed serious deprivations, hardship, or reduction in property values on those subject to their reach, but these losses had to be borne without compensation, as part of the national war effort. Since "just compensation" cannot be blind to the realities of wartime life and still remain fair and equitable, we believe that the limitations imposed upon conscripted manpower and upon war workers, and the various restrictions on the use of property which often led to substantial uncompensated losses as well as reduced earnings to its owners—all for the purpose of enabling the nation successfully to defend itself and its people from foreign aggression—should be considered in determining the measure of compensation for war takings. It seems to us hardly less

[52] In order to further the successful prosecution of the war, this Court has also sanctioned the restriction of the personal freedom of American citizens by curfew orders and the designation of areas of exclusion (*Hirabayashi* v. *United States*, 320 U. S. 81; *Korematsu* v. *United States*, 323 U. S. 214), the restriction of freedom of speech in a manner that would be unwarranted in time of peace (*Schenck* v. *United States*, 249 U. S. 47), the prohibition of the sale of liquor (*Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146), and the Government operation of the railroads (*Northern Pacific Railway Company* v. *North Dakota*, 250 U. S. 135).

than substantial justice to everyone, including the property owner, that the measure of just compensation for property requisitioned for use in the defense of the nation—which, of course, includes the owner of the seized property—should normally not exceed the sum which other persons who were selling their property during the war received and could receive, *i. e.*, the constitutionally-established maximum price, which at the very least bears the stamp of being generally fair and equitable. Cf. *Lord Mfg. Co.* v. *United States,* 84 F. Supp. 748, 755–756 (C. Cls.).[53]

[53] In the recent *Lord Mfg. Co.* case (decided July 11, 1949), the Court of Claims upheld contract repricing orders administratively issued by the War and Navy Departments during the war under Title VIII of the Revenue Act of 1943 (58 Stat. 21, 92, secs. 801–802, 50 U. S. C. App. 1192), and in connection with compulsory "orders to produce" issued to the plaintiff, which was almost the sole producer of certain necessary war materials. The court held that the administrative award of cost plus 10.5% constituted just compensation, as against the contractor's claim that he was entitled to his commercial list prices, which would have yielded him a profit of 50 to 100 percent.

The Court of Claims strongly emphasized the close connection between the facts of a wartime emergency, and the determination of just compensation:

"But these were not ordinary times. It requires no description to make Americans realize that everything they had was involved in the undertaking with which they were faced. Plaintiff contends that its list prices represented the market value; that it could have sold all the items which it could produce at the list price or at a higher price, and that this constitutes the measure of just compensation. There are two fallacies in this position. The Fifth Amendment says nothing about market value. It uses the term 'just

In particular, it would not be unfair to deprive the owner of a post-war "retention value" attributable to the very tensions and dislocations of war which imposed comparable or worse deprivations on so many others—through the workings of the manpower, priority, price-fixing, allocation, and profit-limitation requirements. It is in nature of modern war that few can count confidently upon emerging unscathed. "In total war it is necessary that a civilian make sacrifices

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compensation.' It is true that frequently market value is the best yardstick for determining just compensation, and is therefore usually applied where there is a free and untrammeled market. But here there was no such market. * * * Many other facts might be recited as contributing during the emergency to the question of what constitutes just compensation, but certainly it would not be fair when the price of food, the wages of labor and the prices of all other materials going into the war effort were being controlled, to permit a market value based on what almost amounted to a monopoly, plus a shortage of material elements, to constitute the measure of just compensation. * * *

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The nation was in great peril—our national life being at stake. People were necessarily attuned to the war effort. Men and women were uncomplainingly permitting themselves to be drafted for all kinds of difficult war jobs. Women and even children were driving tractors in the hot sun to produce and supply the food essential to the world-wide operations of our army and navy and those of our allies. Young men, who had never had a fling at life, were taken from their homes to face hardship and even death on distant fields. Businessmen generally and even plaintiff's competitors were willingly accepting the 10 percent above cost for supplies and equipment needed in the war effort. * * * the doctrine that prices may be based on what the traffic will bear has no place in our national economy at such a time." See, also, fn. 40, *supra*, pp. 66-67.

of his property and profits with at least the same fortitude as that with which a drafted soldier makes his traditional sacrifices of comfort, security and life itself." *Lichter* v. *United States*, 334 U. S. at 754.[34]

(b). The intrinsic justice of disregarding the war-caused post-war rise in prices, which "retention value" is largely supposed to gauge, is confirmed by certain requisition measures adopted in World War II by others of the democratic combatants which have long followed the principle of awarding just compensation for requisitioned property. The British Compensation (Defence) Act, 1939 (2 & 3 Geo. 6, ch. 75, Sept. 1, 1939) provided in Section 2 (land), 4 (vessels,

[34] Our general position is exemplified in the following colloquy which occurred in the course of the House debates in regard to a proposed amendment to Title VI of the Second War Powers Act which, as enacted, amended the provision of the Requisitioning Act of 1941, here involved:

"Mr. TABER. Does not the gentleman realize that the only reason a man is entitled to any compensation is because it is not considered fair that the man whose property is taken should bear the whole burden? Now, is it any more nearly fair if a man's business is entirely put out as a result of taking something to give him compensation for any one thing?

"Mr. CELLER. I respectfully differ with the gentleman. The man drafted may have his business entirely wiped out. He cannot continue in absentia. He gets no compensation for the destruction of his business or factory. Furthermore, we must adopt two different standards, one in peacetime and one in wartime, and that is the very quintessence of this situation. In wartime we cannot adopt the type of damage involved in the amendment of the gentleman from New York." [88 Cong. Rec. 1778.]

vehicles, and aircraft), and 6 (other goods) that "no account shall be taken of any appreciation in the value thereof due to the emergency." [55] The Canadian Compensation (Defense) Act, 1940 (4 Geo. VI, ch. 28, August 7, 1940), provided that "no account shall be taken of any appreciation in the value thereof [*i. e.*, vessels and aircraft] due to the war." New Zealand's Shipping Requisitioning Emergency Regulations, 1939, Amend-

[55] The British Indemnity Act, 1920 (10 & 11 Geo. 5, ch. 48, August 16, 1920) variously provided that certain compensation claims for the taking of vessels should take account "of the profits which the owner could have made if there had been no war", and not take account of "any increase of market values of tonnage or rates of hire due to the war" (Schedule, Part I); that certain other compensation claims should be assessed on a basis taking account of "the existence of a state of war" (sec. 2 (2) (iii) (a)), and others without including anything "in respect of any loss or damage due simply and solely to the existence of a state of war" (Schedule, Part II).

Also, in World War I, the British Defense of the Realm (Acquisition of Land) Act, 1916 (December 22, 1916), 6 & 7 Geo. 5, ch. 63, provided that in determining the amount of compensation for land compulsorily acquired for war purposes, "the value of the land acquired shall be taken to be the value which the land would have had at the date [of taking] if it had remained in the condition in which it was at the commencement of the present war, without regard to any enhancement or depreciation in the value which may be attributable directly or indirectly to any buildings, works, or improvements, erected, constructed, or made on, over or under the land, or any adjoining or neighbouring land for purposes connected with the present war wholly or partly at the expense of the State, or with the consent of the occupying department, at the expense of any person not being a person interested in the land * * *" (Schedule, par. 6).

ment No. 1 (November 29, 1939), provided that the price to be paid for a vessel, the title of which was requisitioned, "shall be the fair market value thereof at the date of acquisition together with any special value to the owner due to the use made by him of the vessel but excluding any enhancement of value arising from war conditions and their effect on the market, and excluding also any consideration of special value due to the fact that it is a component of a fleet or service" (Statutory Regulations 1939, p. 1004). The Australian "Basis of Compensation Order" (issued under Regulation 60 H of the National Security (General) Regulations) provided that in computing an award for interests in land "no account shall be taken of any appreciation of values due to the war," and, in another connection, excluded "any increase in rental value attributable to the war."[86]

[86] The Australian Basis of Compensation Order was invalidated by the High Court as failing to provide the "just terms" required by section 51 of the Australian Constitution, but the war "enhancement" clause, referred to in the text, was not the ground for the invalidation. *Minister of State for the Army* v. *Dalziel*, 68 C. L. R. 261 (1944); *Minister of State for the Army* v. *Pacific Hotel Pty Ltd.*, noted at 68 C. L. R. 310 (1944). Only two of the five justices discussed the "enhancement" clause (Latham, C. J. and Starke, J., who dissented from the general invalidation of the Order), and both apparently thought it clearly valid. 68 C. L. R. at 293, 310–312. Starke, J., commented: "Again, the direction that no account shall be taken of any appreciation of values due to the war is also, I suppose, a provision to which exception is taken [by counsel for the owner]. *But that kind of provision has been common in Compensation Acts for many*

Article 23 of the French law of July 11, 1938 (concerning wartime requisition, *inter alia*) provided that "* * * the indemnities due as a result of requisition shall be calculated by taking account only of the actual loss which the definitive or temporary dispossession imposes on the prestator [*i. e.*, owner] on the day of requisition, exclusive of the profit which the free disposition of the property might procure him and of any rise in prices produced by speculation or monopoly or any other circumstances imputable to the state of war or of external tension." Journal Officiel, July 13, 1938, p. 8330; Wise, *Requisition in France and Italy* (1944), pp. 13–14, 20, 49–51, 85. [57]

E. ACCEPTANCE OF THE PRICE CEILING WOULD NOT INVADE THE JUDICIAL FUNCTION IN EMINENT DOMAIN PROCEEDINGS

Finally, we believe that no barrier to the acceptance of a valid price ceiling as the measure of just compensation is raised by the principle of *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 327, that the "measure of compensation * * * is a judicial and not a legislative question."

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years and there is nothing unreasonable or unjust about it." 68 C. L. R. at 293. [Italics supplied.]

[57] A previous French law on the general organization of the nation for time of war contained a similar provision concerning "an increase of prices illicitly brought about by speculation or the cornering of the market or by other circumstances imputable to war." See H. Doc. 163, 72d Cong., 1st sess., pp. 878–879.

Even if that rule be accepted in its full sweep,[58] there is nothing to prevent a court from adopting, in the performance of its judicial function, the price ceilings established under a Congressional enactment because, in the circumstances of wartime, those price ceilings constitute a fair, equitable, and just measure of compensation for war takings. Cf. *United States* v. *Felin & Co.*, 334 U. S. 624. We do not urge that Congress has established, in the Price Control Act, any "rule of compensation" (148 U. S. at 327) which the courts are bound by statute to follow (see fn. 11, *supra*, p. 35), but only that the courts, in determining for themselves the issue of compensation, should adopt the price ceiling as the proper measure. And the *Monongahela* rule certainly does not go so far as to deny the courts power to accept a valid price ceiling, as such, because it was administratively established; the right to a judicial review by the specially-created Emergency Court of Appeals is available (*supra*, p.

[58] In the Government's brief in *United States* v. *Cors*, 337 U. S. 325, Oct. Term, 1948, No. 132, at pp. 41–55, it was urged that if the *Monongahela* case held that Congress was powerless to lay down any legislative rules of compensation for takings, it was erroneous, and that Congress can validly establish measures of just compensation which differ from the accepted judicial standards. The Court found it unnecessary to pass upon this argument. 337 U. S. at 331–2. For the reasons given in the text, we do not believe it necessary to make that argument here, but if it were, we would re-advance the position taken in last term's case.

31), and there is no reason why the compensation court must pass for itself on the issue of the validity of the ceiling or its generally fair and equitable character. Cf. *United States* v. *Jones*, 336 U. S. 641, 669–670 (if suit for railway mail pay is one for just compensation, the Court of Claims can review an I. C. C. order setting the rate of pay, but cannot substitute its own judgment).

On the contrary, the very existence of the *Monongahela* principle furnishes an impetus toward judicial acceptance of the price ceiling as the normal measure of just compensation. For in World War II Congress went far toward doing what it thought it could to take the profits out of war, to keep the war's costs on a fair and reasonable level, and to share them equitably.[59]

[59] Ever since the end of World War I, Congress has been strongly concerned about the high prices charged the Government for all war supplies, the large profits made on munitions or equipment furnished to the nation, particularly the large awards which were made for commandeered property. See, *e. g.*, the studies of the War Policies Commission, H. Docs. 163, 271, 72d Cong., 1st sess. (1931–1932), especially No. 271, pp. 23–25 (high awards for commandeered property); the reports of the Special Senate Committee on Investigation of the Munitions Industry pursuant to S. Res. 206 of the 73d Cong., S. Reps. Nos. 477 and 944 (1935–1936), 74th Cong., especially pt. 2 of No. 944, pp. 3, 111–113 (high awards for requisitioned property); Hearings before the Committee on Military Affairs, H. of Reps., 68th Cong., 1st sess. on H. J. Res. 128, H. R. 194, H. R. 4841 and H. R. 8111 (March 1924) ("Universal Modification for War Purposes"); and Hearings before the Committee on Military Affairs, H. of Reps., 74th Cong., 1st sess. on H. R. 3 and

It enacted the excess profits tax and price-fixing legislation; it provided for contract renegotiation and the readjustment of patent royalties (*supra*, pp. 79–81); and by Section 902 of the Merchant Marine Act of 1936 (49 Stat. 1985, as amended, 46 U. S. C. 1242), it attempted to eliminate some of the war profits resulting from the requisitioning of war-needed vessels. Congress did not, however, make any effort to prescribe comparable rules in the general requisitioning statutes of 1941 and 1942. The reason for this is not that Congress was unconcerned with that facet of the war profits and war-costs problem, but rather that leading legislative sponsors of this legislation indicated that, under the *Monongahela* rule, Congress could not validly lay down any measures of just compensation different from those traditionally applied by the courts (88 Cong. Rec. 1778–1779). Indeed, until recently, there were many who thought the enhancement clause of the Merchant Marine Act's Section 902 was an unconstitutional infringement by the Congress on the judicial function. Thus, control of war profits and costs in connection with wartime requisitions of property is one instance where the Court's admonition that "* * * if the Executive is in need of additional laws by which to protect the nation against war profiteering, the Constitution has given to Congress, not to this

H. R. 5293 (January 1935) ("Taking the Profits Out of War").

Court, the power to make them" (*United States* v. *Bethlehem Steel Corp.*, 315 U. S. 289, 309), has been thought in many quarters to be inapplicable. Congress has largely done what it thought it could under the Constitution to control these profits. It has been left up to the courts to close the sole remaining substantial gap in the effort to eliminate this evil.

II

THE FINDINGS OF THE COURT OF CLAIMS DO NOT SUPPORT ITS AWARD OF 15 CENTS PER POUND, AND COMMODITIES IS CERTAINLY NOT ENTITLED TO ANY HIGHER AWARD

In No. 163, Commodities urges that the Court of Claims erred in awarding 15 cents a pound rather than 22 cents. To support this position, it relies on seven factors (Pet. 3; Br. 5–6), and asserts that the court below not only failed to accord proper weight to these factors but also failed in several instances properly to find the facts relating to them. These same factors—and one or two additional—are also apparently called upon to show that the ceiling price does not constitute just compensation. In this Point, we discuss each of these grounds on which Commodities relies; the thread of the argument will be that, (a) as for the factors which the Court of Claims refused to consider at all, its holding was plainly correct, even on the hypothesis that the ceiling price is not decisive; (b) on the same hypothesis,

the Court of Claims gave more than sufficient weight to the factors which it did weigh; and, finally, (c) none of these factors invalidates our major contention that the ceiling price is determinative. We shall also show that the findings of the Court of Claims do not support its award of 15 cents per pound—even on its assumption that the ceiling price was irrelevant—because the factors on which its judgment rests furnish too weak a foundation for evaluating the worth of Commodities' pepper at that sum.

A. THE SO-CALLED NORMAL "CYCLE" OF PEPPER PRICES

The Court of Claims' opinion indicates that it gave some general weight, in unspecified measure, to Commodities' theory that, *in the absence of war,* there would be a fairly constant and therefore predictable movement or cycle of black pepper prices over a span of years, and that the time for high prices would have come in 1944 (R. 25-26, 27). The court's finding on this point is that (R. 22–23):

> The consequent reduction in crop was first noticeable, so far as its effect on prices was cerned, in 1937, 1938, and 1939, and by 1941 had had sufficient effect in raising prices so that new plantings might have been made in 1942. *If there had been no war in 1941,* it is probable that production of pepper in Sumatra would have decreased each year after that until about 1945 or 1946, when the new plantings would have

> begun to bear. This decreased supply during the period from 1942 to 1945 or 1946 would have had effect in raising pepper prices in the United States. [Italics supplied]

(Br. 49)

There is no estimate in either findings or opinion as to what the higher price would have been.

In support of its contention that the court should have considered "the price at which it was reasonable to estimate that said pepper would have sold in the open market in New York in May 1944, *had there been no war*" (Br. 6; italics supplied), Commodities attacks the finding quoted above as not being as strong as the evidence. Although it concedes that no witness actually estimated that price, it claims that the evidence shows that "any reasonable estimate would put the total price above 20¢ in May 1944" (Br. 49).

1. In our view, the hypothetical price which would have prevailed "had there been no war" should have been entirely ruled out. The existence of World War II is an intervening fact which cannot be avoided, because its existence admittedly interfered drastically with the alleged normal workings of the pepper-cycle. The coming of a world war certainly had had that effect before the Indies were invaded; in addition, the Japanese overran Sumatra and Indo-China in the winter and spring of 1941–1942; and Commodities does not contend that normal conditions continued.

As indicated above (p. 93), the Court of Claims' finding on this point does not say that the alleged normal cycle continued despite the war, or attempt to differentiate between the portion of an asserted actual wartime price rise attributable to the workings of the cycle and that due to the war's intervention. The finding is limited to what would have occurred "if there had been no war in 1941," and Commodities' evidence was geared to produce that kind of hypothetical finding.

In Point I, we urge that a theoretical "value" which-would-have-existed-if-there had been no war—of the type Commodities offers here—should not be allowed if it exceeds the ceiling price. *Supra*, pp. 25–88.[50] If our views as to the decisive status of the ceiling price be rejected—because the pepper had "retention value" for which the owner should be compensated—we suggest that this type of speculative construction of a non-existent peaceful span of years, in lieu of the actual war period, is ordinarily a very unsure basis for determining the actual "current" or "retention" value of the requisitioned commodity at the time of taking. See fn. 49, *supra*, pp. 75–76. If it is to be considered at all, it should be with great caution, and only if there is presented some con-

[50] In short, we do not believe that it would be a "travesty upon justice" (Br. 49) for the owner of property requisitioned for war purposes to receive less—because of a wartime price ceiling—than it could have obtained had there been no war. A war changes many lives and alters many values—property and otherwise. *Supra*, pp. 71–88.

vincing evidence as to what the market would have been if there had never been a war.

2. In any case, Commodities' claim that the pepper price in May 1944 would have been over 20¢, according to the cyclical theory of the movement of pepper prices, is unsound, and Commodities' own evidence even indicates that the Court of Claims itself placed entirely too much weight on the theory.

According to the theory, pepper prices over 100 years have moved in regular cycles, and "the length of time between the several tops and the several bottoms was always about 15 years, the life of the pepper plant" (Pet. 62; cf. Br. 49). In line with this theory, the claim is that since "the last top was 40¢ in 1928" "the next top (no war occurring) should have been about fifteen years later or 1943" (Pet. 63).

One major difficulty with applying this theory to forecast the price of pepper in 1944 is that the most recent cycle did not adhere to this alleged 15-year pattern. Commodities' expert, Katz, testified that the last peak was in 1925, 1926, and 1927 (R. 67); that this peak of 40¢ per pound was "the highest price we have reached in fifty or one hundred years or whatever it was, and on account of that production increased so tremendously" (R. 67). As a result of this abnormal peak, the valley of the cycle was not reached by 1933, 1934, 1935, as the theory indicated should have happened. Instead, during that period there

was a rise in prices, with an 11-cent peak reached in 1934, and thereafter the prices steadily declined until they reached a low of 3 cents per pound in June 1939 (R. 68).

Thus, the movement of pepper prices during the 1930's is not explicable under the cycle theory. Mr. Katz further testified that the proponents of the 15-year cycle theory made the mistake, in applying it to prices during the 1930's, of forgetting the abnormality of the 1925-1927 peak (R. 67, 68). Commodities apparently made the same mistake for it began its pepper operations in 1933 (R. 14, at a time when, under the theory, the prices should have hit bottom, whereas at that time they actually rose to a peak in 1934, and only thereafter did they decline to the 1939 low (R. 16).[61]

[61] Commodities' whole argument, on this point, is that the production of pepper in the Dutch East Indies is the only important factor governing pepper prices in New York. But this cannot be so, since a comparison of annual production and prices shows that there is no close correlation. For instance, the prices in 1936 and 1938 were practically the same (R. 16), although the 1936 crop appears to have been about one-third larger than that for 1938. It seems clear (as Commodities' President admitted below) that other factors must affect the price significantly. General world trading conditions are important, and even more dominant is the reserve or stockpile at any given time. The greater the reserve, the greater the depressing effect upon any upward movement of prices steming from reduced imports. And the American inventories of from 78,000,000 to 100,000,000 pounds, in 1942, were very large and undoubtedly would tend to keep down inflationary pressures.

Nor is the increase in price from the 3-cent low of June, 1939, to over 6 cents a pound in December 1941, when the first price ceiling was imposed, purely a normal increase explicable entirely under the cycle theory. The increase in pepper prices in 1939 and 1940 was practically nil; the 1940 average price was only one-tenth of a cent higher than the 1939 price (R. 15). Apparently, although production of pepper was decreasing, the stockpile was sufficiently great to keep prices down. Then, going into 1941, the price jumped from 4.1 cents in January to 4.5 cents in February to 6.2 cents in March, and thereafter continued at about this level (R. 15). But this price increase was attributable not to the normal workings of the cycle but rather to speculators who apparently regarded war in the Far East as fairly imminent and there was a large amount of buying of pepper futures (R. 108–109). It was because of this speculation that the margin requirements were increased substantially in August 1941 (see R. 89–90, 109), and, after the renewal and increases of such speculation on the outbreak of war, the Price Administrator imposed the first pepper ceiling price in December 1941. See *supra*, pp. 4–5, 46.

If this speculative increase due to the war is eliminated, there is no reason to believe that it would not have been as much of a mistake to apply the cycle theory to pepper prices following their abnormal low in June 1939 as it was to follow that theory while prices were supposed to

be declining in the middle 1930's. *Supra*, p. 97. Indeed, when asked "You do not know how far it [the price of pepper] would have gone by May 1944," Mr. Katz, Commodities' main expert witness, responded, "No, sir, that is too much of a guess" (R. 68).[62]

Plainly, therefore, there is no basis for Commodities' claim that the price of pepper in May 1944, absent a war, would have been in excess of 20 cents a pound. And even the lesser reliance which the court below apparently placed in the cyclical theory is likewise unsupported by the evidence. It was impossible to predict with any accuracy what the price of pepper would have been in 1944 if there had been no war.[63]

B. THE COST OF THE REQUISITIONED PEPPER

The Court of Claims found that the cost to Commodities of the requisitioned pepper was 12.7 cents a pound, and considered it as one element in the determination of just compensation, with

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[62] The testimony of Commodities' other expert, William Archibald, Jr., was merely to the effect that he thought that prices would increase in general accordance with the "cycle" but he would not give any figures, and refused to say what the price would have been in May 1944 (R. 87, 81). Contrary to Commodities' statement in its brief (Br. 51), Mr. Archibald expressly refused to state whether or not the price would even have exceeded the so-called "50-year average" of 13½ cents by May 1944 (see transcript of testimony in the Court of Claims, at pp. 231–232).

[63] *A fortiori*, the cyclical theory would be of little or no help in predicting, as of May 1944, what the post-war price of pepper would be. The intervention of the war destroyed whatever predictive value the theory had. See also *infra*, pp. 102–104; *supra*, p. 69, fn. 45.

the comment that the 15-cent value fixed by the court "allows [Commodities] a little more than 2 cents a pound profit" (R. 27).

Commodities challenges this finding as too low (Br. 58–60). It asserts that its costs properly should be "built up" by the inclusion of hypothetical costs to 17½ cents, to which should be added "an allowance for holding and managing the pepper for 9 years" (Br. 59). Thus, Commodities urges that "cost plus a reasonable profit" justifies and requires an allowance in excess of 20 cents per pound (Br. 6, 20, 59). However, whatever error the court below committed as to the costs of the pepper was, we submit, in Commodities' favor.

1. We have already pointed out (*supra*, pp. 61–62), that Commodities itself selected the high-cost pepper which the Government took on this requisition, and that it adopted the policy of retaining its high-cost pepper as long as possible, disposing first of the lower-cost stocks—thus greatly inflating the "cost" of the particular bags of pepper seized by the Government. If more realistic and fairer methods of determining costs are adopted, there is no basis for the claim that the Price Administrator underestimated the cost of Commodities pepper, and certainly none for saying that the Court of Claims' determination was erroneous. *Supra*, pp. 58, 61–63.

2. The addition by the court below of two cents a pound profit to Commodities' costs (R.

27), as well as Commodities' claim that it was entitled to "profit for holding and managing the pepper for 9 years" are erroneous as a matter of law, for it is well established that just compensation requires that the owner be awarded only the value of his property and not a profit on it. *United States ex rel. T. V. A.* v. *Powelson,* 319 U. S. 266, 281–282; cf. *De Laval Co.* v. *United States,* 284 U. S. 61, 74; *Russell Motor Car Co.* v. *United States,* 261 U. S. 514, 523–524.

3. Nor is there any basis for including, as Commodities suggests (Br. 6, 59), hypothetical costs such as interest at a rate higher than that actually paid, and costs for administrative and general services rendered gratuitously by its officers. The Court of Claims' allowance of interest limited to the rate actually paid accords with the requirements of just compensation. *United States ex rel. T. V.* v. *Powelson,* 319 U. S. 266, 285. The other costs are administrative overheads which themselves add little, if anything, to the value of the pepper taken. This situation, therefore, is unlike *United States* v. *Cors,* 337 U. S. 325, 327, 336, relied on by Commodities (Br. 59), for in that case the owner had repaired and improved the vessel, and he claimed that this labor actually enhanced the ship's value materially. At most, these costs are general costs of running Commodities' investment business, and are not compensable in eminent domain proceedings, where only the value of the particular property

taken is to be paid for. Cf. *United States* v. *Petty Motor Co.*, 327 U. S. 372, 378; *United States* v. *General Motors Corp.*, 323 U. S. 373, 382; *Kimball Laundry Co.* v. *United States*, 338 U. S. 1, 11–12.

C. COMMODITIES' CLAIM FOR FURTHER "RETENTION VALUE"

The Court of Claims rested its award of 15 cents per pound, and its rejection of the ceiling price, on an evaluation of the pepper's "retention value" in May 1944 (R. 25–27), and we have urged, in Point I, that it was error to add anything to the ceiling price on that account. *Supra*, pp. 67–88). Commodities contends, however, that the lower court failed to award it the proper sum on account of "retention value," and that the correct award would bring the unit price up to at least 22 cents per pound (Br. 53–57, 60–64).[64]

1. If we are right in our primary argument that the ceiling price controls, Commodities' three grounds for asserting that the pepper's "reten-

[64] Three of Commodities' seven factors (Pet. 3; cf. Br. 5–6) deal with "retention value":

"(b) the price which, in May 1944, it was reasonable to expect would be obtained for Whole Black Pepper at the end of the War, less carrying charges to that time, pepper being non-perishable and easily stored;

"(c) the price which plaintiffs-petitioners could actually have obtained for the pepper at the time of decontrol, less carrying charges from May 1944 to that date;

* * * * *

"(e) the replacement cost—more than 50¢ per pound."

See fn. 65, *infra*, p. 104.

tion value" exceeds that allowed by the Court of Claims likewise must fall. Neither the post-war price which could be expected (in May 1944) to be obtained for the pepper, nor the post-war price which could actually have been obtained, nor the actual post-war replacement cost (see fn. 64) could be considered.

In this connection, it should be noted that a judgment, as of 1944, as to the price Commodities could have gotten "had it been permitted to hold [the pepper] until after restrictions had been removed" (R. 27) was difficult, not only because of the general inability to predict at that time the course and outcome of the war, the duration of controls, or the circumstances of post-war history, but also because the Japanese invasion made it impossible to know the state of pepper-production in the Far East—the factor which Commodities urges as the most important in determining the price of pepper on a free market. Footnote 45, *supra*, p. 69.

2. If the Court of Claims did not err in considering "retention value" of this type, Commodities cannot complain of the particular evaluation it made. The court expressly considered the first of the three factors now brought forward—*i. e.*, the expected post-war price of pepper—and its specific determination of that factor is not plainly erroneous, though it differs from the owners' conclusion.

The other two factors—*i. e.*, actual post-war selling price,[65] and actual post-war replacement cost—were also apparently considered,[66] but they are entitled to only slight weight in evaluating "retention value" as of May 1944. The value of the condemned property is to be determined as of the date of taking, and, as the Court of Claims itself has held, "retention value" also is to be determined and fixed as of that time. *Fabrica Uruguaya de Neumaticos, S. A.* v. *United States*, 84 F. Supp. 745, 747 (rejecting an actual post-war price as the measure of "retention value"). And actual post-war pepper prices were the resultant of so many variables, many of which were unforeseeable or unmeasurable in May 1944, that the court below cannot be charged with error in failing to find that the expected post-war price, as of May 1944, was the same as the actual price turned out to be.

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[65] This factor is mentioned in the petition in No. 163 (see fn. 64, *supra*, p. 102), but is apparently abandoned in the brief on the merits (Br. 5–6, 53, 55).

[66] The court made findings as to the post-decontrol prices (R. 18), and refers to these prices in its opinion (R. 26). The opinion later states that the court considered certain unspecified events occurring after the requisition, in determining "retention value" (R. 27), but it is not expressly indicated whether the post-decontrol prices were considered in judging the price Commodities "could have secured for its pepper had it been permitted to hold it until after restrictions had been removed" (R. 27). However, the quoted language covers these 1946 prices.

D. SUBSEQUENT SALES OF PEPPER AT HIGHER PRICE CEILINGS

In addition to "retention value" (discussed *supra*, pp. 102–104) and the cost of the pepper discussed *supra*, pp. 99–102), the Court of Claims considered the price at which Commodities *subsequently* sold pepper [domestic sales at 10 and 16 cents per pound; sales in Puerto Rico at average price of 14.19 cents a pound] as elements in determining just compensation. We believe that these later sales are in large measure irrelevant to the determination of the prescribed compensation. At most, only the sales at 10 cents a pound had any real bearing on the issue before the court, and those sales indicated a valuation of the pepper by Commodities at substantially less than the 15 cents a pound which was allowed.

1. The Puerto Rican sales have little bearing on just compensation. In addition to the fact that these sales were made in June, 1945—more than a year after the requisition here involved and at a price based, in accordance with the Second Revised Maximum Export Price Regulation (8 Fed. Reg. 4132), on the increased ceiling price then in effect (R. 19) (see *infra*, pp. 113–115)—these sales involved less than 1% of Commodities' holding (124,000 pounds (R. 19)) and unlike *United States* v. *New River Collieries Co.*, 262 U. S. 341 (discussed in fn. 10, *supra*, p. 34), there was no evidence either that the Puerto Rican market could have absorbed any additional pep-

per, or that Commodities desired to sell in that market. As far as it appears, these small Puerto Rican sales, together with the even smaller sales, aggregating 35,000 pounds, to Argentina authorized by export license (R. 91), were the only foreign sales made by Commodities.[37]

2. Nor do the later domestic sales at increased OPA ceiling prices indicate that the Price Administrator thought that the earlier ceiling was unfair or that the fair value of pepper had increased. The price ceilings in effect at the time of those sales [10 cents a pound in October, 1944, and 16 cents a pound in March, 1946] were fixed not because the Price Administrator considered the original 6.63 cent ceiling price to be no longer "fair and equitable", but rather because each time Commodities had required these increases as the terms under which it would agree to sell pepper for civilian consumption. See *supra*, pp. 50–51.

Whatever validity there may be to Commodities' suggestion that these sales were made "involuntarily" and solely because of pressure (but cf. *Morrisdale Coal Co.* v. *United States*, 259 U. S. 188, 190), it seems clear that the needs of the

[37] The South American export price referred to at Commodities' Br. 12, 42, 45, was only available to exporters obtaining licenses. There is no showing whatever that Commodities sought, desired, or could have obtained such licenses, nor in what amounts they would have been allowed if request had been made.

economy exerted far greater pressure on the Price Administrator to accede to terms dictated by Commodities. Virtually no pepper was available for needed civilian purposes. Commodities owned the bulk of the available pepper supply and was adamant in its refusal voluntarily to part with any of its holdings at the established 6.63 cent ceiling. All during the period from February 1942, when that ceiling price was first fixed, until October 1944, when the ceiling price was raised to 10 cents a pound, Commodities retained its holdings and refused to sell any substantial part of it, despite the public's urgent needs. Indeed, when the Government sought to requisition some of the pepper for civilian use in early 1944, Commodities obtained an injunction against its consummation. See *supra*, p. 50. It was only after every means for cutting Commodities loose from its holdings had been exhausted that the ceiling prices were increased to meet Commodities' terms. See the Price Administrator's Statement of Considerations on the first increase, OPA Price Service Food Desk Book, Vol. 2, p. 16731 (quoted in pertinent part, *supra*, p. 51). Prices so determined clearly do not indicate what the Office of Price Administration regarded as the lowest "fair and equitable" price. On the contrary, even such legally-authorized prices may be said to reflect a "hold-up value, not a fair market value" (*United States* v. *Cors*,

337 U. S. 325, 334), stemming from Commodities' near-monopoly of pepper, and should not be considered in determining just compensation for the earlier taking. See *supra*, pp. 56–57, 63–66.

An additional factor indicating the irrelevance of the sales at 16 cents a pound is that these sales occurred approximately two years after the requisition. Reliance on these sales ignores the fundamental principle that the value of the property taken is to be determined as of the time of taking. *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299, 306; *Vogelstein & Co.* v. *United States*, 262 U. S. 337; *United States* v. *New River Collieries*, 262 U. S. 341; *Olson* v. *United States*, 292 U. S. 246.

3. The only sales that might be relevant to the determination of Commodities' compensation—if the price ceiling at the time of taking is rejected—are the domestic sales at 10 cents a pound. These took place about 6 months after the requisition, and although they were made subsequent to the present requisition and at OPA ceiling prices, the price, it must be remembered, was fixed with the agreement of Commodities. See *supra*, pp. 9–10, 50–51. This fact, taken together with Commodities' offer, prior to the instant requisition, to sell 1,000,000 pounds to the War Department at 9¾ cents a pound (R. 20) (*supra*, p. 8) indicates that Commodities' own contemporaneous valuation of the pepper was substantially lower than the amount fixed by the Court of Claims. Cf. *Vogelstein &*

Co. v. *United States*, 262 U. S. 337 (discussed *supra*, pp. 54–55).

E. THE INDIAN MARKET

Although the Court of Claims made findings as to the price at which pepper could, in 1944, have been imported from India pursuant to an allocation of the Allied Food Commission, the court, properly we submit, did not consider these prices in determining Commodities' compensation. The court below found (R. 21) and Commodities has conceded (Br. 46–48) that "American importers were unable to take advantage of the allocation of British pepper" (R. 21). None of the Indian pepper actually was imported into the United States in 1944, because of valid restrictions imposed by the Office of Price Administration and no Indian pepper was sold or used here.[28]

The price of that pepper, therefore, was not, as Commodities claims (Pet. 47), "probably the

[28] Contrary to Commodities' suggestion (Br. 47–48), none of the Indian pepper purchased by the Government's Commodity Credit Corporation in 1945 (a year or more after the requisition here involved) and exported by private exporters to South America, was used domestically. This pepper had been allocated for South American consumption by the Combined Food Board and its distribution through the New York exporters followed t. regular distributing channels (R. 46–47). Nor was the Army's 1954 purchase of Indian pepper relevant. These purchases were long after the requisition at bar and were made pursuant to an exception granted by OPA to protect the domestic supply for civilian consumption (R. 48–49).

fairest and most tangible basis for allowance to plaintiffs." On the contrary, it had no relationship whatever to Commodities' damages or to the value of the requisitioned pepper at the time and place of taking in the United States, since American buyers and sellers could not lawfully avail themselves of this Indian pepper for resale in the United States. Valuation of the seized commodity must take account of such valid restrictions, and the situation must be viewed as if the Indian pepper did not exist or were physically unobtainable in American markets. *Supra*, pp. 36–41. Cf. *United States* v. *Delano Park Homes*, 146 F. 2d 473 (C. A. 2); *Bowles* v. *Willingham*, 321 U. S. 503, 517; *Perry* v. *United States*, 294 U. S. 330, 354–358; *Nortz* v. *United States*, 294 U. S. 317, 328–329; see *United States* v. *Toronto, Hamilton and Buffalo Navig. Co.*, this Term, No. 39, decided December 12, 1949, slip op. pp. 9–10.[69]

F. OTHER PEPPER CEILING PRICES AT THE TIME OF REQUISITION

Commodities presents four or five special pepper ceiling prices—in addition to the general maximum of 6.63 cents which was admittedly applicable to it—and claims that it could have availed itself, in May 1944, of any of these special

[69] Commodities apparently suggests (Br. 46–48) that the failure to admit Indian pepper, and the level of the Indian market price, indicates the unfairness of the general ceiling price, but this point was never made to the Emergency Court, and is not open here. *Supra*, pp. 30–34.

ceilings in order to obtain more than 6.63 cents per pound (Br. 12, 41–45, 57–58). The fact is that Commodities never sought to bring itself within the limited classes covered by these other ceilings, and they are wholly inappropriate to measure just compensation for its pepper.[70]

1. The exception from the general price ceiling of sales of less than one bag (150 lbs.) (*infra*, p. 126)—even if Commodities could lawfully take advantage of the privilege—is obviously inapplicable to a requisition of 759,750.88 pounds (R. 13).

2. Similarly, the ceiling price for imitation black pepper (R. 18–19) has no place here. Imitation pepper was a new product, its production a new business, and hence the ceiling price fixed for it as a newly manufactured product was established on a different basis—cost of manufacture plus a fair profit—from those for products traded prior to the imposition of price controls. See Section 2 (a) of the Emergency

[70] There are also suggestions in Commodities' brief (Br. 9, 12, 41–45, 57–58) that the existence of these special ceilings somehow proves the unfairness of the general maximum. This is an argument which likewise should have been addressed to the Emergency Court of Appeals, and the compensation court is not the proper forum to hear or decide such challenges. The unchallenged basic maximum must be accepted as generally fair and equitable. Moreover, even to those not expert in the pepper industry, it seems plain that the Price Administrator promulgated these separate ceilings for good reasons, and that they are based on rational and persuasive distinctions.

Price Control Act of 1942, 50 U. S. C. App. 902 (a). Despite the 30-cents-per-pound price Commodities now says it could easily have secured by manufacturing imitation black pepper (Br. 6, 12, 42–43, 58), the record contains nothing to indicate that it was ever anything but a speculator or "investor" in pepper, or that it desired or was able to do this type of manufacturing, or what it would cost it to make the synthetic product. By its own admission, Commodities has never associated with the spice trade generally (Pet. 39); "it was in no sense a regular commercial undertaking" (R. 52). Indeed, there is nothing to show that Commodities ever engaged in grinding pepper, or other spice processing of any kind, that it ever attempted or desired to enter this field, or that, in wartime, it could have secured the equipment or facilities necessary to have done so. This special ceiling price, then, was not in reality available to Commodities—as is proved by its own failure to take advantage of a very high price it now says it could easily have secured—and it is wholly irrelevant to the present proceeding.

3. Commodities also mentions the 12½-cent ceiling price on real ground pepper (R. 19) (Br. 45). But, as we have just stated, there is not a syllable in the record suggesting that Commodities could, or would, have engaged in the grinding business during the war, and almost

nothing to indicate what it would have cost it to make the ground product. The ground pepper ceiling price approximately took into account not only the cost of the whole pepper, but the normal differential, including the cost of grinding, packaging, and marketing. Real ground pepper was closely analogous to whole black pepper, and its ceiling price, reflecting additional elements of costs, both supports the fairness of the ceiling price on whole black pepper and suggests that Commodities' manufacturing costs would have been such that it would avail it nothing, in this proceeding, to insist that it could have made ground pepper and sold that commodity at its ceiling price.

4. Finally, the export price at the time of requisition is likewise immaterial. The record does not disclose that there were any export sales made at or about the time when the pepper was requisitioned, or that Commodities engaged generally in the export business. *Supra*, pp. 105–106. Nor is there any showing that Puerto Rico, Alaska, and Hawaii could or would absorb any significant portion of the 760,000 pounds seized here. And Commodities has not proved that the costs of such export sales (which would have to be deducted if this special ceiling is used) would not be sufficiently high to offset any excess over the domestic price.

Moreover, a reading of the whole black pepper

maximum price regulation, in conjunction with the general export regulation in effect at the time of requisition (the Second Revised Maximum Export Price Regulation, 8 Fed. Reg. 4132), leaves it unclear as to whether the general export regulation governed export sales of pepper at that time (May 1944).[71] In any case, even if the formula for computing the price ceiling provided in the general export regulation were applicable, the proper price would probably have been no more than 9.4 cents a pound, an amount substantially less than the 14.19 cents a pound received by Commodities on its Puerto Rican sales (*supra*, pp. 105–106). This is so because, under that formula, export prices are based on domestic ceilings, which at the time of requisition were 6.63 cents a pound, whereas the ceiling price at the time of the later Puerto Rican sales was 10 cents (R. 19). Hence, this contemporaneous export price would support neither Commodities' claim of 22 cents nor the lower court's award of 15

[71] In May 1944, Price Schedule No. 52, establishing the general ceiling on whole black pepper, provided that "the maximum prices for pepper sold for export may exceed" the domestic maximum "by no more than ten percent" (*infra*, p. 126). In October 1944, this was amended to provide that export prices "shall be determined in accordance with the provisions of the Second Revised Maximum Export Price Regulation, as amended." This was characterized in the Price Administrator's Statement of Considerations as a "paragraph which has become standard" (OPA Price Service, Food Desk Book, vol. 2, p. 16,731), but it is not clear whether the amendment was a substantive change or merely a codification of a preexisting rule which the general export regulation had already made applicable to pepper.

cents. If anything, it would indicate the fairness of the War Department's administrative award based on the applicable domestic ceiling price, since export sales normally involve extra costs and services, and the higher ceiling for export sales was predicated on that fact.

Even if the cost of Commodities' pepper could be used, instead of the domestic ceiling, in computing the export maximum (as Commodities now argues; but see R. 19),[72] a fair evaluation of its costs would take into account the fact that Commodities apparently retained its higher-cost pepper during the war and voluntarily disposed of its lower-cost goods before the war. *Supra*, pp. 58, 61–63. On a fairer cost basis, it is unlikely that the export price would be anywhere near as high as the 14 cent price Commodities urges. Subtracting the extra costs attributable to exporting, it is doubtful whether Commodities could gain anything by use of the export rather than the domestic ceiling.[73]

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the Court of Claims should be reversed, with directions to enter an

[72] Archibald, who handled the 1945 Puerto Rico sales for Commodities, testified, as its witness, that the export differential was added to the current domestic ceiling price, and not to cost. See testimony in the Court of Claims at pp. 243–24.

[73] On the ceiling price for the restricted export sales to South America (Br. 45), see fn. 67, *supra*, p. 106.

appropriate judgment for respondents in 156 (petitioners in No. 163) on the basis of the general maximum ceiling price for whole black pepper in effect in May 1944, together with appropriate interest.[74]

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[74] The judgment would include (1) an award of $50,266.76 (R. 14), plus (2) compensation for delay in payment from May 26, 1944 (the date of requisition) to September 26, 1945 (the date of the administrative award), at 4 percent—amounting to $2,680.89 (an aggregate sum of $52,947.65), less (3) the sum of $26,404.14, already paid on account (R. 15). The balance amounts to $26,543.51.

APPENDIX A

The pertinent portions of the general wartime Requisitioning Act, as it read at the time of the requisition involved here (Act of October 16, 1941, c. 445, 55 Stat. 742, as amended by the Act of March 27, 1942, c. 199, 56 Stat. 181, and the Act of June 30, c. 181, 57 Stat. 271),[1] provided as follows:

> Whenever the President, during the national emergency declared by the President on May 27, 1941, but not later than June 30, 1944, determines that (1) the use of any military or naval equipment, supplies, or munitions, or component parts thereof, or machinery, tools, or materials necessary for the manufacture, servicing, or operation of such equipment, supplies, or munitions is needed for the defense of the United States; (2) such need is immediate and impending and such as will not admit of delay or resort to any other source of supply; and (3) all other means of obtaining the use of such property for the defense of the United States upon fair and reasonable terms have been exhausted, he is authorized to requisition such property for the defense of the United States upon the payment of fair and just compensation for such property to be determined as herein-

[1] The statute was thereafter amended, in respects of no significance to this case, by the Act of June 28, 1944, c. 307, 58 Stat. 624, and the Act of June 30, 1945, c. 208, 59 Stat. 271. See 50 U. S. C. App., 1940 ed. Supp. V, 721. The Act has expired by its own terms. See note under "Codification," 50 U. S. C. App., 1946 ed., 721).

after provided, and to dispose of such property in such manner as he may determine is necessary for the defense of the United States. The President shall determine the amount of the fair and just compensation to be paid for any property requisitioned and taken over pursuant to this Act * * * but each such determination shall be made as of the time it is requisitioned * * * in accordance with the provision for just compensation in the fifth amendment to the Constitution of the United States. If, upon any such requisition of property, the person entitled to receive the amount so determined by the President as the fair and just compensation for the property is unwilling to accept the same as full and complete compensation for such property he shall be paid 50 per centum of such amount and shall be entitled to sue the United States in the Court of Claims or in any district court of the United States in the manner provided by sections 24 (20) and 145 of the Judicial Code (U. S. C., 1934 ed., title 28, secs. 41 (20) and 250) for an additional amount which, when added to the amount so paid to him, he considers to be fair and just compensation for such property. * * *

APPENDIX B

The pertinent provisions of the Emergency Price Control Act of 1942 (Act of January 30, 1942, ch. 26, 56 Stat. 23, 50 U. S. C. App. 901), provide as follows:

> SEC. 2 (a) [50 U. S. C. App. 902 (a)]. Whenever in the judgment of the Price Administrator (provided for in section 201) the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 (or if, in the case of any commodity, there are no prevailing prices between such dates, or the prevailing prices between such dates are not generally representative because of abnormal or seasonal market conditions or other cause, then to the prices prevailing during the nearest two-week period in which, in the judgment of the Administrator, the prices for such commodity are generally representative), for the commodity or commodities included under such regulation or order, and shall make adjustments for such relevant factors as he may determine and deem to be of general applicability, including the following: Speculative fluc-

tuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of the commodity or commodities, during and subsequent to the year ended October 1, 1941. Every regulation or order issued under the foregoing provisions of this subsection shall be accompanied by a statement of the considerations involved in the issuance of such regulation or order. As used in the foregoing provisions of this subsection, the term "regulation or order" means a regulation or order of general applicability and effect. Before issuing any regulation or order under the foregoing provisions of this subsection, the Administrator shall, so far as practicable, advise and consult with representative members of the industry which will be affected by such regulation or order. In the case of any commodity for which a maximum price has been established, the Administrator shall, at the request of any substantial portion of the industry subject to such maximum price, regulation, or order of the Administrator, appoint an industry advisory committee, or committees, either national or regional or both, consisting of such number of representatives of the industry as may be necessary in order to constitute a committee truly representative of the industry, or of the industry in such region, as the case may be. The committee shall select a chairman from among its members, and shall meet at the call of the chairman. The Administrator shall from time to time, at the request of the committee, advise and consult with the committee with respect to the regulation or order, and with respect to the form thereof,

and classifications, differentiations, and adjustments therein. The committee may make such recommendations to the Administrator as it deems advisable. Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he may, without regard to the foregoing provisions of this subsection, issue temporary regulations or orders establishing as a maximum price or maximum prices the price or prices prevailing with respect to any commodity or commodities within five days prior to the date of issuance of such temporary regulations or orders; but any such temporary regulation or order shall be effective for not more than sixty days, and may be replaced by a regulation or order issued under the forgoing provisions of this subsection.

* * * * *

SEC. 204 (a) [50 U. S. C. App. 924]. Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. A copy of such complaint shall forthwith be served on the Administrator, who shall certify and file with such court a transcript of such portions of the proceedings in connection with the protest as are material under the complaint. Such transcript shall include a statement setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice. Upon the filing of such complaint the court shall

have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding: *Provided,* That the regulation, order, or price schedule may be modified or rescinded by the Administrator at any time notwithstanding the pendency of such complaint. No objection to such regulation, order, or price schedule, and no evidence in support of any objection thereto, shall be considered by the court, unless such objection shall have been set forth by the complainant in the protest or such evidence shall be contained in the transcript. If application is made to the court by either party for leave to introduce additional evidence which was either offered to the Administrator and not admitted, or which could not reasonably have been offered to the Administrator or included by the Administrator in such proceedings, and the court determines that such evidence should be admitted, the court shall order the evidence to be presented to the Administrator. The Administrator shall promptly receive the same, and such other evidence as he deems necessary or proper, and thereupon he shall certify and file with the court a transcript thereof and any modification made in the regulation, order, or price schedule as a result thereof; except that on request by the Administrator, any such evidence shall be presented directly to the court.

(b) No such regulation, order or price schedule shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the court that the regulation, order, or price schedule is not in accordance with law, or is arbitrary or capricious. * * *

(c) There is hereby created a court of the United States to be known as the Emergency Court of Appeals, which shall consist of three or more judges to be designated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals. The Chief Justice of the United States shall designate one of such judges as chief judge of the Emergency Court of Appeals, and may, from time to time, designate additional judges for such court and revoke previous designations. The chief judge may, from time to time, divide the court into divisions of three or more members, and any such division may render judgment as the judgment of the court. The court shall have the powers of a district court with respect to the jurisdiction conferred on it by this Act; except that the court shall not have power to issue any temporary restraining order or interlocutory decree staying or restraining, in whole or in part, the effectiveness of any regulation or order issued under section 2 or any price schedule effective in accordance with the provisions of section 206. The court shall exercise its powers and prescribe rules governing its procedure in such manner as to expedite the determination of cases of which it has jurisdiction under this Act. * * *

(d) Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided

in section 240 of the Judicial Code, as amended (U. S. C., 1934 edition, title 28, sec. 347). The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

APPENDIX C

REVISED PRICE SCHEDULE NO. 52—PEPPER

(As effective on May 26, 1944)

(6 Fed. Reg. 6375, as amended by 7 Fed. Reg. 724, 1308, 1836, 2132, 6385, 8948, 8 Fed. Reg. 13244)

Pepper is one of the imported commodities which in the past have often been sharply influenced by speculative price manipulations. It is the most important and widely distributed spice used by the American housewife and by packing industries. The outbreak of hostilities in the Far East on December 7, 1941, gave rise to a sharp increase in speculative activity which caused this Office on December 11, 1941, to issue a temporary price freezing order, limiting prices to those prevailing on December 8, 1941.

In the intervening weeks, this Office has engaged in a thorough study of the economic and trade position of pepper. Due consideration has been given to the prices prevailing during the period October 1 to October 15, 1941, with adjustments for relevant factors. To prevent further price increases and to maintain the stability recently achieved, the Office of Price Administration hereby issues a permanent price schedule for black and white pepper.

Such specifications and standards as are used in this regulation were, prior to such use, in general use in the trade or industry affected.

Accordingly, under the authority vested in me by Executive Order No. 8734, it is hereby directed that:

§ 1351.101 *Maximum prices for pepper.* On and after December 11, 1941, no person shall sell, offer to sell, deliver, or transfer pepper, and no person shall buy, offer to buy, or accept delivery of pepper at prices higher than the maximum prices set forth in Appendix A hereof, incorporated herein as § 1351.111, except that contracts entered into prior to February 3, 1942, but subsequent to December 11, 1941, may be carried out at prices not higher than the maximum prices contained in Price Schedule No. 52 as effective prior to this amendment No. 1, and that contracts entered into prior to December 11, 1941, may be carried out at the contract prices. (See § 1351.110.)

§ 1351.102 *Export sales.* The maximum prices for pepper sold for export may exceed the prices set forth in § 1351.111 by no more than ten percent.

§ 1351.103 *Exempt sales.* Sales of pepper at retail and sales of less than one bag of pepper shall be excepted from the operation of Price Schedule No. 52.

§ 1351.104 *Less than maximum prices.* Lower prices than the maximum prices established by Price Schedule No. 52 may be charged, demanded, paid, or offered.

§ 1351.105 *Evasion.* The price limitations set forth in Price Schedule No. 52 shall not be evaded whether by direct or indirect methods in connection with a purchase, sale, delivery, or transfer of pepper, or by way of premium, commission,

service, transportation or other charge, or by any other trade understanding, or by making the discounts given or other terms and conditions of sale more onerous to the purchaser than those available or in effect on December 11, 1941, or by any other means.

§ 1351.106 *Records and reports.* (a) All sellers and all buyers who have entered into contracts prior to February 3, 1942, for the sale or delivery of pepper, on or after February 3, 1942, at prices higher than the maximum prices established by Price Schedule No. 52, shall report all such contracts to the Office of Price Administration on or before February 25, 1942, stating (1) the name and address of the buyer and seller; (2) the actual date of the contract; (3) each and every delivery date provided for in the contract; and (4) the price, quantity, and description of the product sold.

After the buyer has received the final shipment called for by the contract he shall then report such receipt to the Office of Price Administration within two weeks thereof, certifying that the total amount received did not exceed the quantity specified in the contract.

(b) Every person making purchases or sales of pepper on and after February 3, 1942 shall keep for inspection by the Office of Price Administration for a period of not less than one year complete and accurate records thereof, including the name of the purchaser, the date of the contract, the price paid or received, and the type, grade, quality, and amount sold.

(c) Every person affected by Price Schedule No. 52 shall submit such reports to the Office of

Price Administration as it may from time to time require.

§ 1351.107 *Petitions for Amendment.* Any person seeking an amendment of any provision of this Revised Price Schedule may file a petition for amendment in accordance with the provisions of Revised Procedural Regulation No. 1.

§ 1351.108 (a) *Enforcement.* (1) Persons violating any provision of this Revised Price Schedule No. 52 are subject to the criminal penalties, civil enforcement actions, and suits for treble damages provided for by the Emergency Price Control Act of 1942.

(2) Persons who have evidence of any violation of this Revised Price Schedule No. 52 or any price schedule, regulation or order issued by the Office of Price Administration or of any acts or practices which constitute such a violation are urged to communicate with the nearest field or regional office of the Office of Price Administration or its principal office in Washington, D. C.

§ 1351.108a *Licensing.* The provisions of Licensing Order No. 1, licensing all persons who make sales under price control are applicable to all sellers subject to this regulation or schedule. A seller's license may be suspended for violations of the license or of one or more applicable price schedules or regulations. A person whose license is suspended may not, during the period of suspension, make any sale for which his license has been suspended.

§ 1351.109 *Definitions.* (a) "Person" includes an individual, corporation, partnership, association, or any other organized group of persons, or

legal successor or representative of any of the foregoing, and includes the United States or any agency thereof, or any other government, or any of its political subdivisions, or any agency of the foregoing.

(b) "Sales at retail" means sales to the ultimate consumer: *Provided,* That no grinder, processor, purchaser for resale, or commercial user shall be deemed to be an ultimate consumer.

(c) "Cost of putting pepper into the warehouse" includes (1) "Labor in and out" and (2) warehouse storage charges for not more than thirty days.

(d) "Pepper sold for export" means sales by a domestic seller directly to a foreign buyer and/or foreign broker.

§ 1351.110. *Effective date of Price Schedule No. 52.* This Schedule (§§ 1351.101 to 1351.108, inclusive) shall become effective on December 11, 1941.

§ 1351.111 *Appendix A: Maximum prices for pepper.* (a) The maximum prices shall include all import commissions. The maximum prices shall also include all other charges, except that:

(1) Increases in the charges prevailing prior to the opening of business on December 8, 1941 for ocean freight, war risk insurance, and marine insurance may be added to the maximum prices only if such charges have been actually incurred by the seller on such sale. Decreases in said charges prevailing prior to the opening of business on December 8, 1941 must be subtracted from the maximum prices.

(2) If the services of a broker or brokers are required, a commission or commissions which in

the aggregate shall not exceed one percent of the selling price may be added to the maximum price, provided such commissions have been actually paid.

(b) The maximum prices for pepper shall be as follows:

	Cents per pound ex dock New York City
Lampong Black Pepper	6.50
Aleppy Black Pepper	8.50
Muntok White Pepper	11.50
White Small Berries	10.50

The maximum prices for pepper imported from any other country or for grades of inferior quality not named shall be determined by applying the customary trade differentials to the above prices.

(c) The maximum prices quoted above are ex dock New York City. The maximum prices ex dock any other port of entry shall be determined by adding to or subtracting from the New York City Price the difference the actual cost of ocean freight, war risk insurance, and marine insurance from the port of origin to New York City and the actual cost of ocean freight, war risk insurance, and marine insurance from the port of origin to such other port of entry.

(d) For any pepper sold ex warehouse, rather than ex dock New York City or any other port of entry, the cost of actually "putting the pepper into the warehouse" as defined in § 1351.109 may be added by the seller who incurred the cost.

(e) The delivered price for pepper shall in no case exceed the maximum prices specified above plus actual transportation charges incurred from the dock or warehouse at New York City or other port of entry to the place of destination or to

the place of ship loading, if the pepper is intended for export.

(f) Any person making sales of pepper in lots of 100 bags or less may add to the maximum prices specified above an amount which shall not exceed:

5% on sales of 50 to 100 bags
7½% on sales of 25 to 49 bags
10% on sales of 5 to 24 bags
one cent on sales of 1 to 4 bags

(g) The above prices shall be the maximum prices for all transactions except for futures contracts traded on the New York Produce Exchange. In such contracts the maximum prices shall be the prices listed below. The maximum prices for futures contracts for months, if any, after October, 1942, shall not exceed 6.63 cents per pound. The maximum prices for futures contracts, if any, traded in months currently inactive shall not exceed the maximum prices for the last active preceding month.

	Cents per pound
March	6.35
May	6.48
July	6.50
September	6.60
October	6.63

Issued this 11th day of December 1941.

LEON HENDERSON,
Administrator.

U. S. GOVERNMENT PRINTING OFFICE: 1941